



State of Texas Contract Management Guide



STATE OF TEXAS CONTRACT MANAGEMENT GUIDE

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Introduction

Contract management is the coordination and management of five core processes:

- Planning
- Procurement
- Contract Formation
- Rate/Price Establishment
- Contract Administration

There is no single “right” way to contract. Various types of purchases and contracts may require different practices, processes, and strategies for successful implementation. The suggestions, comments, techniques, examples and recommendations included in this Guide are **NOT** appropriate for every type of contract. The nature and level of risk associated with each of these elements vary depending on the nature of the business relationship.

Purpose

The purpose of the Contract Management Guide (Guide) is to offer state agency contract managers recommendations on improving existing contract management processes and practices. A Contract Manager is responsible for coordinating the processes required for effective contract management. Contract management may involve a variety of distinct disciplines and roles including:

1. Executive Management;
2. Organization Management;
3. Project Management;
4. Planning;
5. Program Staff (subject matter experts and monitors);
6. Contractor Management;
7. Purchasers;
8. Accounting/Budget;
9. Legal;
10. Audit;
11. Quality Control/Assurance;

THIS GUIDE :

- Provides practical suggestions as well as best practices to improve agency contracting practices. Appendix #15 includes a best practices matrix designed to help agencies determine where a contract management program currently stands in relation to generally accepted contract management best practices. This matrix offers a number of best practices in several key contract management areas and is recommended for use to improve practices where applicable and to implement the best contract management program possible. The matrix is intended to assist agencies with organizing contract management programs and leveraging technology, metrics, training and lessons learned for the purpose of minimizing risks throughout the overall supply chain. The matrix also includes a reference section that points to the applicable areas of the Contract Management Guide or Procurement Manual with respect to each contract management component. Since the needs of each agency and requirements of each contract are different, the information in this Guide is intended to be applied flexibly, not mechanically. However, the Guide provides a framework which agencies should use to make contracting decisions that are in the best interest of the State.
- Describes the duties of a contract manager, including how to develop and negotiate a contract, select a contractor, and monitor contractor and subcontractor performance.
- Supplements but does not replace existing statutory requirements and agency rules, policies and procedures. Each agency is independently responsible for developing sound business procedures in accordance with applicable federal and state laws, regulations, policies and procedures.
- Is not intended to be a manual on the law of contracts or constitute legal advice. General principles of law will be discussed, but these are only general principles which include many exceptions. A Legal Reference Section provided at the end of this Guide will provide you with general information regarding contracting issues within the contract management process. **ALWAYS CONSULT AN ATTORNEY FOR LEGAL ADVICE CONCERNING CONTRACTS.**
- Includes model contract provisions, distinguishing between essential, recommended and optional contract provisions.
- Addresses the maximum contract term, after which a new competitive solicitation must be issued.
- Recommends time frames for the solicitation, evaluation, negotiation and awarding of a major contract.
- Establishes the procedure through which state agencies must consult with the Contract Advisory Team before issuing a solicitation for a major contract.
- Establishes the procedure agencies must use in attempting to determine why a single response is submitted to an agency procurement solicitation.

How the Guide is Organized

This Guide is a companion to the State of Texas Procurement Manual (Procurement Manual) and both should be used to achieve maximum benefit. Where appropriate, links are provided to the Procurement Manual to provide detailed information not included in the Guide.

In addition, a Legal Reference Section is provided at the end of the Guide to provide assistance to agency purchasing departments and legal staff regarding applicable legal cites and case law. Where appropriate, links to the Legal Reference Section are provided throughout the Guide. The Legal Reference Section should not be used by purchasing department staff in lieu of consultation with legal staff.

Professional Certification

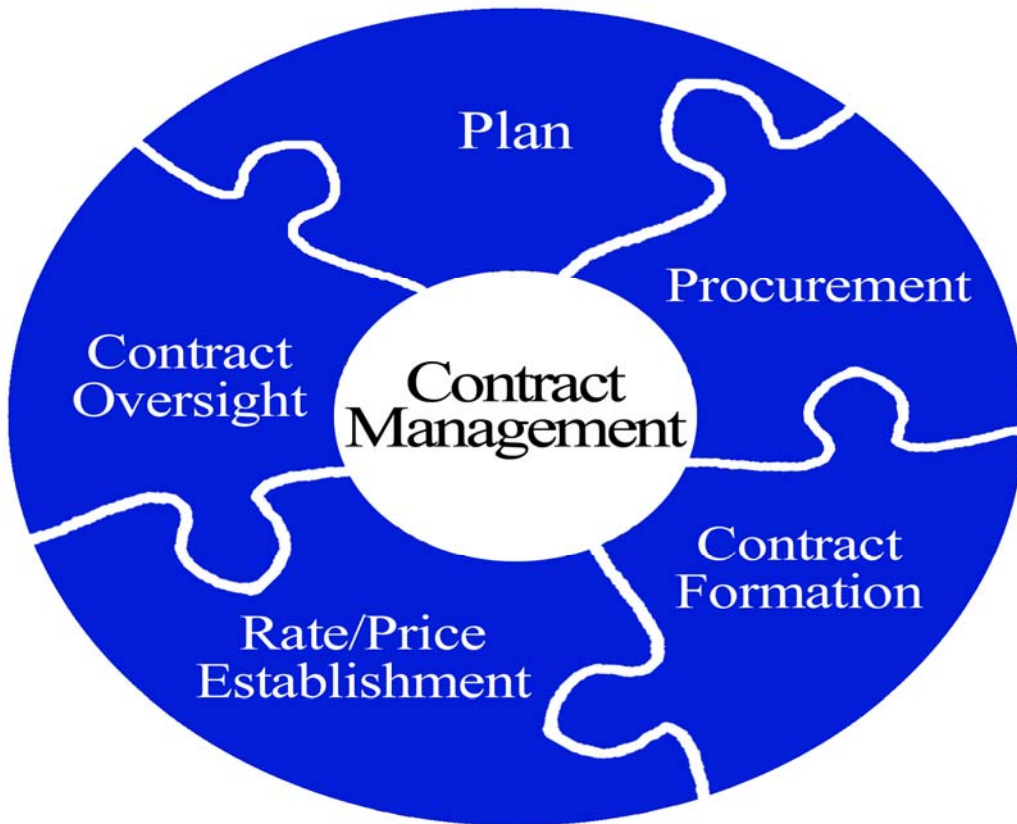
All state agency purchasing personnel must be trained and certified to the extent required by the Texas Comptroller of Public Accounts (CPA). The only exceptions are for institutions of higher education to which Sections 51.9335 or 73.115, Education Code, apply. For purposes of the CPA's procurement training and certification program, purchasing personnel is defined as all persons who perform any of the following duties for a state agency:

- An employee who does any of the following purchasing/contracting functions as a regular part of their job
- Approves solicitations for advertisements to the public. (Note: Specifications may be provided by user departments or developed by the purchasing employee based on information provided by the user departments and/or potential vendors.)
- Decides the appropriate procurement method (i.e. – CPA term contracts, formal or informal IFB, CPA Open Market or RFP).
- Identifies and/or selects potential vendors (i.e. - marketing the solicitation, etc.)
- Solicits bids, requests for proposals, requests for offers, etc. from vendors.
- Evaluates and awards bids, proposals, offers, contracts, etc.
- Administers contracts/purchase orders from award to completion.
- An employee who is responsible for the purchasing/contracting function of the agency.
- An employee who is empowered to approve or sign purchase orders or contracts with the exception of real estate leasing and major construction projects. (Major construction projects will be defined as those projects requiring the signature of an institution of higher education's president, chancellor, vice chancellor, regents or an agency's executive director or construction projects of the CPA or the State Preservation Board).

Note - It is not the intent of this definition to include (1.) an executive level manager authorized to bind the governmental entity or (2.) an attorney performing traditional legal functions - such as legal review of a contract. Additional information regarding purchaser certification can be found on the Training and Certification website. (<http://www.window.state.tx.us/procurement/prog/training-cert/>)

Contract Management Framework

Effective contract management is dependent on the interaction of the following elements:



Plan – Identify contracting objectives and contracting strategy.

Procurement – Fairly and objectively select the most qualified contractors.

Rate/Price Establishment – Establish processes that are cost-effective and aligned with the cost of providing the goods and services.

Contract Formation – Ensure the contract contains provisions that hold the contractor accountable for producing desired results.

Contract Oversight – Monitor and enforce the terms of the contract.

Definitions

Addendum: An addition or supplement to a solicitation document issued prior to the opening date.

Advertise: To make a public announcement of the intention to purchase goods or services.

Bid: An offer to contract with the state, submitted in response to a bid invitation. Bids are usually non-negotiable.

Bid Deposit: A deposit required of bidders to protect the state in the event a low bidder attempts to withdraw its bid or otherwise fails to enter into a contract with the state. Acceptable forms of bid deposits are limited to: cashier's check, certified check, or irrevocable letter of credit issued by a financial institution subject to the laws of Texas and entered on the United States Department of the Treasury's listing of approved sureties; a surety or blanket bond from a company chartered or authorized to do business in Texas.

Bidder: An individual or entity that submits a bid. The term includes anyone acting on behalf of the individual or other entity that submits a bid, such as agents, employees and representatives.

Bidders List: A list of potential contractors who have expressed an interest in doing business with the State of Texas. See Centralized Master Bidders List.

Bid Opening: The public opening of bids, in which the names of the bidders responding to a bid solicitation and prices of the bidders are publicly read and recorded. See Proposal Opening.

Bid Tabulation: The recording of bids and bid data submitted in response to a solicitation. The bid tabulation is used for comparison, analysis and record keeping.

Biennium: The two (2) year period in which the Texas Legislature appropriates funds. The biennium begins on September 1st of odd numbered years.

Centralized Master Bidders List (CMBL): The CMBL is a list maintained by the Texas Comptroller of Public Accounts (CPA) containing the names and addresses of prospective bidders and catalog information systems vendors.

Competitive Sealed Bidding: Process of advertising an invitation for bids (IFB), conducting a public bid opening and awarding of a purchase order/contract to the lowest responsive, responsible bidder in accordance with state law.

Competitive Sealed Proposals: Process of advertising a request for proposal (RFP), the evaluation of submitted proposals and awarding of the contract.

Consultant: A person that provides or proposes to provide a consulting service.

Consulting Services: Practice of studying and advising a state agency in a manner not involving the traditional employer/employee relationship per Texas Government Code, Section 2254.021 (See Major Consulting Services Contract).

Contract: A written agreement where a contractor provides goods or services in accordance with the established price, terms and conditions.

Contract Administration: This generally refers to the processes that occur after a contract is signed and is explained in detail in Chapter 7.

Contract Advisory Team: The team created to assist agencies in improving contract management practices. The team consists of four (4) members, one from each of the following offices: 1) Office of the Attorney General, 2) Comptroller of Public Accounts, 3) Department of Information Resources, and 4) Office of the Governor per §2262.101, Government Code.

Contract Management: This refers to the entire contracting process from planning through contract administration.

Contract Manager: A person who is: 1) employed by a state agency, 2) has significant contract management duties for the state agency as determined by the agency in consultation with the Texas Comptroller of Public Accounts referenced in §2155.078, and the Commission's rule 113.

Contractor: A business entity or individual that has a contract to provide goods or services to the State of Texas. Used interchangeably with the term "vendor".

Deliverable: A unit or increment of work required by the contract, including such items as goods, services, reports, or documents.

Electronic State Business Daily: The electronic marketplace where State of Texas bid opportunities over \$25,000 are posted. See Procurement Manual (<http://www.window.state.tx.us/procurement/pub/manual/>)

Executive Sponsor: A high level individual with primary responsibility for implementation and operation of the project. In some instances, the executive sponsor may be the executive head of the agency. In other instances, the executive sponsor may be the division or program director with overall project responsibility.

Goods: A transportable article of trade or commerce that can be bartered or sold. Goods do not include services or real property.

Historically Underutilized Business: A minority or women-owned business as defined by Texas Government Code, Title 10, Subtitle D, Chapter 2161. (<http://www.window.state.tx.us/procurement/prog/hub/>)

Invitation for Bids (IFB): Procurement process used when the requirements are clearly defined, negotiations are not necessary and price is the major determining factor for selection. The IFB uses the competitive sealed bid method.

Major Consulting Services Contract: A consulting services contract for which it is reasonably foreseeable that the value of the contract will exceed \$15,000.

Major Contract: A contract that has a value of at least one (1) million dollars during the original term of the contract, not including any renewal periods.

Negotiations: A consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. In a contractual sense, negotiation means the "dealings conducted between two or more parties for the purpose of reaching an understanding".

Payment Bond: A bond executed in connection with a contract which secures the payment requirements of the contractor.

Performance Bond: A surety bond which provides assurance of a bidder's performance of a certain contract. The amount for the performance bond shall be based on the bidder's annual level of potential monetary volume in the state purchasing program. Acceptable forms of bonds are those described in the definition for "bid deposit."

Professional Services: Services directly related to professional practices as defined by the Professional Services Procurement Act (Government Code, Section 2254.002) or services authorized by rule by the Department of State Health Services pursuant to Health and Safety Code, Section 12.0121. These include services within the scope of the practice of: accounting; architecture; optometry; medicine; land surveying; and professional engineering. Services provided by professionals outside the scope of their profession, e.g., management consulting services provided by accounting firms, are not considered professional services.

Proposal: An executed offer submitted by a respondent in response to a Request for Proposals (RFP) and intended to be used as a basis to negotiate a contract award.

Proposal Opening: The public opening of proposals, in which the names of the respondents to a solicitation are publicly read and recorded. No prices are divulged at a proposal opening as these types of solicitations are subject to negotiation. See Bid Opening and the Procurement Manual.

Purchasing Department: The office designated to purchase goods and services for a state agency.

Request for Information (RFI): A general invitation to contractors requesting information for a potential future solicitation. The RFI is typically used as a research and information gathering tool for preparation of a solicitation.

Request for Offer (RFO): A solicitation for automated information systems (which may include a request for hardware, software and other information technology goods and services) requesting the submittal of an offer in response to the required scope of services, including a cost proposal. Negotiations are allowed between a proposer and the issuing agency.

Request for Proposal (RFP): A solicitation requesting submittal of a proposal in response to the required scope of services and usually includes some form of a cost proposal. The RFP process allows for negotiations between a proposer and the issuing agency.

Request for Qualifications (RFQ): A solicitation document requesting submittal of qualifications or specialized expertise in response to the scope of services required. No pricing is solicited with an RFQ.

Request for Quote (RFQ): An informal solicitation document requesting pricing on small dollar purchases.

Responsive: The respondent has complied with all material aspects of the solicitation document, including submission of all required documents.

Respondent: An entity submitting a proposal in response to a solicitation. (See Bidder)

Responsible: The respondent has the capability to fully perform and deliver in accordance with the contract requirements. The agency may include past performance, financial capabilities and business management as criteria for determining if a bidder or proposer is capable of satisfying the contract requirements.

Service: The furnishing of labor by a contractor which may not include the delivery of a tangible end product. In some cases, services and goods may be combined such as film processing. In these instances, agencies determine whether labor or goods is the primary factor. In the case of film processing, the labor to process the film is the primary factor, therefore film processing is considered a service.

Solicitation: A document requesting submittal of bids or proposals for goods or services in accordance with the advertised specifications.

Solicitation Conference: A meeting chaired by state agency personnel which is designed to help potential bidders/respondents understand the requirements of a solicitation. Also known as a pre-bid or proposal conference.

State: the State of Texas.

State Agency: an agency of the State of Texas as defined in Texas Government Code §2056.001.ⁱⁱ

Strategic Sourcing: a concept of purchasing with the objective to purchase goods or services that will minimize costs, increase managerial effectiveness and improve operational efficiency.

Sub-recipient: a non-federal entity that expends federal awards received from a pass-through entity to carry out a federal program, but does not include an individual that is a beneficiary of such a program. A sub-recipient may also be a recipient of other federal awards directly from a federal awarding agency. Sub-recipients are considered contractors for purposes of this Guide.

Vendor: a business entity or individual that has a contract to provide goods or services to the State of Texas. Used interchangeably with the term “contractor”.

Ethical Standards and Policies

State officials and employees are responsible for protecting the safety and welfare of the public’s monies. All state officials and employees should endeavor to pursue a course of conduct that does not raise suspicion among the public. Therefore, they shall avoid acts which are improper or give the appearance of impropriety. This conduct is particularly important for state purchasing personnel and contract management personnel who are charged with the disposition of state funds.

State purchasing personnel must adhere to the highest level of professionalism in discharging their official duties. The nature of purchasing functions makes it critical that everyone in the purchasing process remain independent and free from the perception of impropriety. Any erosion of public trust or any shadow of impropriety is detrimental to the integrity of the purchasing process. Consequently, the credibility of a purchasing program requires that a clear set of guidelines and rules be established. Such guidelines are designed to prevent actual and potential vendors from influencing state officers or employees in discharging their official duties. Furthermore, these guidelines will help prevent state officials’ and employees’ independent judgment from being compromised.

Therefore, with these principles in mind and in accordance with state law, the following policies and procedures should be adhered to by all state agency employees, contractors and potential contractors.

State Ethics Policy

It is the policy of the State of Texas that a state officer or state employee may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur any obligation of any nature that is in substantial conflict with the proper discharge of the officer’s or employee’s duties in the public interest.ⁱⁱⁱ

Standards of Conduct

A state officer or employee should not:

1. Accept or solicit any gift, favor, or service that might reasonably tend to influence the officer or employee in the discharge of official duties or that the officer or employee knows or should know is being offered with the intent to influence the officer’s or employee’s official conduct;
2. Accept other employment or engage in a business or professional activity that the officer or employee might reasonably expect would require or induce the officer or employee to disclose confidential information acquired by reason of the official position;
3. Accept other employment or compensation that could reasonably be expected to impair the officer’s or employee’s independence of judgment in the performance of the officer’s or employee’s official duties;
4. Make personal investments that could reasonably be expected to create a substantial conflict between the officer’s or employee’s private interest and the public interest; or
5. Intentionally or knowingly solicit, accept or agree to accept any benefit for having exercised the officer’s or employee’s official powers or performed the officer’s or employee’s official duties in favor of another.^{iv}
6. A state agency may not use appropriated money to compensate a state employee who violates a standard of conduct.^v

Prohibition of Economic Benefit

In accordance with the Texas Constitution^{vi}, an officer or employee of the state may not, directly or indirectly, profit by or have a pecuniary interest in the preparation, printing, duplication, or sale of a publication or other printed material issued by a department or agency of the executive branch. A person who violates this section shall be dismissed from state employment.^{vii}

Conflict of Interest

To avoid conflicts of interest state agencies should require all potential contractors to disclose, in their responses to solicitations, any actual or potential conflicts of interest in their proposed provision of services or other performance under any contracts resulting from the solicitations. Respondents should also be required to update that information throughout the terms of any contracts resulting from the solicitations.

Additionally under §2252.901, Texas Government Code, agencies may not enter into employment contracts, professional services contracts under Chapter 2254, or consulting services contracts under Chapter 2254 with former or retired employees before the first anniversary of the last date on which the individual was employed by the agency if appropriated funds are used to make payments under the contract.

Agencies should also require respondents to:

- Represent and warrant that their provision of services or other performance under the agreement will not constitute an actual or potential conflict of interest and represent and warrant that it will not reasonably create even the appearance of impropriety.
- Disclose any current or former employees who are current or former employees of the state.
- Disclose any proposed personnel who are related to any current or former employees of the state.
- Represent and warrant that they have not given, nor intend to give, at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor or service to a public servant or employee or representative of the State of Texas in connection with the solicitation.

Contractors should not be allowed to assign any portion of the contract or their performance, to others, for example, subcontractors, without the prior written consent of the agency. Contractors remain responsible for the performance of the contract notwithstanding any such assignment or subcontract. This ensures that the evaluated and selected entity will actually be responsible for performance and that proposed transactions may be reviewed for compliance with the conflict of interest and related party provisions.

When soliciting and contracting for the services of financial advisors, agencies should comply with Chapter 2263, Texas Government Code (enacted by 78th legislature), regarding conflict of interest and related party provisions applicable to those financial advisors.

Financial advisors or service providers must disclose in writing to the administrative head of the state governmental entity and the State Auditor's Office (SAO) the following. For this purpose, "financial advisor or service provider" includes a person or business entity who acts as a financial advisor, financial consultant, money or investment manager, or broker.

- (1) any relationship the financial advisor or service provider has with any party to a transaction with the state governmental entity, other than a relationship necessary to the investment or funds management services that the financial advisor or service provider performs for the state governmental entity, if a reasonable person could expect the relationship to diminish the financial advisor's or service provider's independence of judgment in the performance of the person's responsibilities to the state governmental entity; and

(2) all direct or indirect pecuniary interests the financial advisor or service provider has in any party to a transaction with the state governmental entity, if the transaction is connected with any financial advice or service the financial advisor or service provider provides to the entity or member, in connection with the management or investment of state funds.

The state statute further provides that:

- Financial Advisor or Service Provider shall disclose a relationship (described above), without regard to whether the relationship is a direct, indirect, personal, private, commercial, or business relationship;
- Financial Advisor or Service Provider must file an annual statement with the administrative head of the governmental entity and with SAO disclosing the relationships outlined above;
- If no relationship existed during the disclosure period, annual statement must state this fact affirmatively;
- Annual statement must be filed no later than April 15th (for the previous calendar year period) on a form prescribed by the entity;

In addition to the above, some state agencies have special conflict of interest provisions that apply to their employees. These laws, rules or policies should be reviewed and followed by agency staff. See the Procurement Manual for additional information on conflict of interest. (<http://www.window.state.tx.us/procurement/pub/manual/>)

Contract Advisory Team

Pursuant to Texas Government Code § 2262.101, the Contract Advisory Team (CAT) is created to assist state agencies in improving contract management practices by reviewing the solicitation of major contracts. Major contracts are defined in Texas Government Code § 2262.001 as any contract having the monetary value of at least one (1) million dollars during the original term of the contract, not including any renewal periods.

Section §2262.102 of the Texas Government Code lists the following members for the CAT:

- one member from the Office of the Attorney General (OAG);
- one member from the Comptroller of Public Accounts (CPA);
- one member from the Department of Information Resources (DIR); and
- one member from the Office of the Governor

The Legislative Budget Board (LBB) and the State Auditor's Office (SAO) serve as technical advisors to the CAT.

CAT Review of Major Contracts

To facilitate the process of major contract solicitation review by CAT, state agencies must submit their:

- Solicitation document(s) - A solicitation document can be but is not limited to a Request for Proposal (RFP), Invitation for Bid (IFB), Request for Application (RFA), Request for Offer (RFO), or Request for Qualifications (RFQ); and
- Any other documents as supplemented to the solicitation or incorporated by reference into or as part of the solicitation.

The CAT will review the solicitation document(s) from a contract management and best practices perspective. In the course of the review, the CAT provides recommendations, identifies risks and offers risk mitigations within thirty (30) days of receipt. If the agency does not receive a response from the CAT within thirty (30) calendar days of initial receipt of the solicitation document(s), the agency may proceed with issuance of its solicitation.

Solicitation documents should be sent to the CAT for review through the CPA web application CATRAD at <https://portal.cpa.state.tx.us/>. In addition to sending the actual solicitation documents, agency personnel are required to fill out a brief submission form summarizing the contract solicitation. This form replaces the Major Contract Questionnaire that is no longer required for CAT reviews. Prior to your first use of CATRAD, state agency personnel must ensure that they: 1) are registered users of the CPA web application portal and 2) have

been granted portal membership rights to CATRAD. In order to accomplish this, agency personnel must request access from an agency dedicated “Superuser” and/or security coordinator of the CPA web application portal. For a list of state agency superusers/security coordinators, go to: <https://portal.cpa.state.tx.us/securitycoordinators.asp>. For assistance in utilizing the CATRAD application, send your questions to: 2262contractadvisoryteam@cpa.state.tx.us.

Upon receiving the major contract solicitation documents, the CAT will send the submitting agency an acknowledgement e-mail that confirms receipt of the solicitation and provides a web link to view the status of the review.

In order to avoid impeding the agency’s procurement process, state agencies should submit their major contract solicitation document(s) after final agency approval or for some state agencies, after final executive-level approval (final executive-level approval may be necessary for some major contract solicitation documents, especially for IT-related solicitations).

If the initial major contract solicitation document submitted to the CAT changes substantially, agencies are required to resubmit their solicitation document(s) for CAT review. Changes in the major contract solicitation are considered substantial when:

- the solicitation change caused the estimated value for the original term of the contract, not including renewal periods, to increase by 25% or more; or
- there are significant revisions, deletions and/or additions to the specifications, statement of work (SOW), set(s) of deliverables, performance measures, payment methodology, etc.

The CAT recommends Procurement, Contract Management, and Legal personnel incorporate the thirty (30) day CAT review period into their procurement schedule to avoid potential delays to the agency’s solicitation, evaluation, and award process.

Should the CAT request the initiating agency to submit a more complete major contract solicitation draft or require clarification, the 30-day turnaround timeframe restarts when the CAT receives all the information needed in order to conduct its review.

Exceptions

Per Texas Government Code §2262.002, institutions of higher education as defined by §61.003 of the Education Code are exempt, as are contracts of the Texas Department of Transportation (TXDOT) that relate specifically to highway construction, highway engineering, or contracts subject to §201.112 of the Transportation Code.

Nepotism Disclosure

As defined by Texas Government Code §2262.004, prior to a state agency awarding a major contract to a business entity, certain agency employees must disclose in writing to the administrative head of the state agency any relationship the purchasing personnel is aware about that the employee has with an employee, a partner, a major stockholder, a paid consultant with a contract with the business entity the value of which exceeds \$25,000, or other owner of the business entity.

Disclosure must be provided by signing the State Auditor’s Office (SAO) Nepotism Disclosure Form (ND Form). For detailed instructions, download the ND Form at:

<http://www.sao.state.tx.us/resources/forms/NepotismDisclosureForm.pdf>

Determination of Contract Value

A major contract is one with a value of at least one (1) million dollars during the original term of the contract, not including any renewal periods. An agency should base its determination of the proposed length of and compensation during the original term and the renewal periods of the contract on best business practices, state

fiscal standards and applicable law, procedures and regulations. Agencies should not artificially split any of these factors to avoid the one million dollar threshold during the original term of the contract and therefore submission of the solicitation to CAT for review.

The method of payment and source of funds are not factors in determining whether the estimated total value shall exceed one million dollars. The soliciting agency shall make a good faith determination as to the estimated total value at the time the solicitation is submitted to CAT and shall advise CAT prior to issuance of any changes in this estimated amount that would impact CAT review.

In making a reasonable and justifiable determination of value of any resulting contracts at the time the solicitation is sent to CAT for review, agencies shall comply with the following requirements.

A. One agency plans to contract with one or more prime contractors:

In scenario A, an agency plans to issue a solicitation under which it reserves the right to award one or more contracts. For example, the agency may solicit responses from one or more qualified, independent consultants to assist it in conducting a review of certain agency operations. From a business perspective, it's acceptable to the agency to have one or more consultants independently conducting various aspects of the review, with one consultant responsible for consolidating all of the other consultants' findings and reports and producing one final report for the project. Each of the selected consultants will be a prime contractor to the soliciting agency and not a subcontractor to other consultants or to the soliciting agency. As another example, a health and human services agency plans to issue a solicitation under which multiple service providers may receive contracts and therefore be eligible for compensation for performance under their contracts.

Under this scenario A, the agency will use its budgeted funds or funds under its control for the project as compensation to the one or more contractors resulting from the solicitation. The contract is not a master contract in that it is not intended for statewide use or for establishment of prime contracts between any using agencies and the selected contractor or contractors. The soliciting agency will be the sole contracting agency.

The agency's estimated total funds, or funds under the agency's control, for the project as a whole are expected to exceed one million dollars during the initial term of the contract. The value to the contractor or contractors as a whole is expected to exceed one million dollars during the initial term of the contract. The solicitation is a solicitation for a major contract. The soliciting agency shall submit the solicitation to CAT for review.

B. One agency plans to establish one master contract – a statewide contract - under which one or more other agencies or local governments may then contract with that one contractor:

A central agency, such as DIR, plans to issue a solicitation under which it selects one contractor for a master contract – a statewide contract – under which one or more other agencies or local governments may then contract with that one contractor. The using agencies and local governments will use their own budgeted funds for the project to independently contract with and pay the one contractor resulting from the solicitation. No funds of the agency issuing the solicitation are involved. The contract is a master contract in that it is intended for use by other agencies or local governments.

In this situation, the total funds expended by the underlying agencies and local governments under their orders under the master contract are estimated to exceed one million dollars. The value to the contractor as a whole is expected to exceed one million dollars during the initial term of contract. The solicitation is a solicitation for a major contract. The soliciting agency shall submit the solicitation to CAT for review.

C. One agency plans to establish multiple master contracts – statewide contracts - under which one or more other agencies or local governments may then contract with one or more of those contractors:

A central agency, such as DIR, plans to issue a solicitation under which it selects multiple contractors for identical master contracts – statewide contracts – under which one or more other agencies or local governments may then contract with one or more of those contractors. The using agencies and local governments will use their own budgeted funds, or funds under their respective control, for the project to pay the one or more contractors resulting from the solicitation. No funds of the agency issuing the solicitation are involved. No funds under the control of the issuing agency are involved. The contracts are master contracts in that they are expressly intended for use by other agencies or local governments.

In this situation, the total funds expended by the underlying agencies and local governments under all of the orders under the master contracts – as a whole - resulting from the one solicitation are estimated to exceed one million dollars. The value to the contractors as a whole is expected to exceed one million dollars during the initial term of the master contracts. The solicitation is a solicitation for a major contract. The soliciting agency shall submit the solicitation to CAT for review.

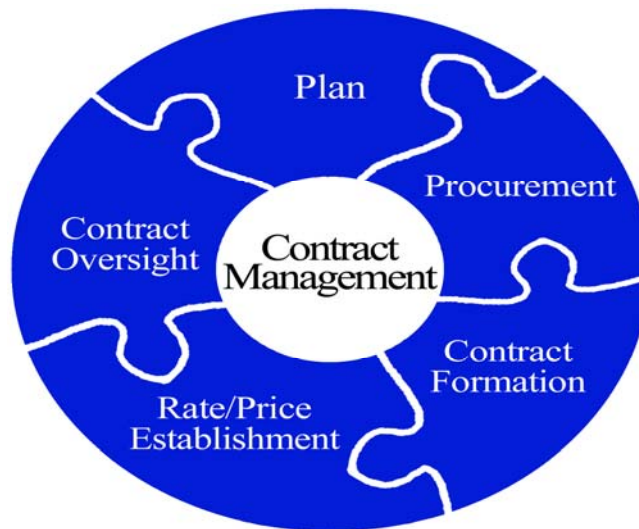
D. Recurring Solicitations under B and C:

Throughout a fiscal year, an agency plans to issue multiple solicitations of the type described in B and C above to establish master contracts for various goods and services. The soliciting agency shall submit the first such solicitation in each fiscal year to CAT and shall submit any subsequent solicitations to CAT that include substantive changes to the statements of work, payment terms, deliverables and similar key provisions, from the first solicitation.

Planning

The first step in contract management is planning. Planning is crucial to the successful outcome of any procurement. With proper planning, agencies are more likely to successfully achieve their contracting objectives. Planning assists agencies in determining need, preparing the statement of work, choosing the appropriate procurement type, solicitation, negotiation, drafting the contract and contractor monitoring and oversight. These steps are complex and there are many instances where errors can be introduced into the process. Proper planning will reduce or eliminate the risk of error.

During the planning phase each of the following elements of contract management must be considered:



Plan – Identify contracting objectives and contracting strategy.

Procurement – Fairly and objectively select the most qualified contractors.

Rate/Price Establishment – Establish process that are cost-effective and aligned with the cost of providing the goods and services.

Contract Formation – Ensure the contract contains provisions that hold the contractor accountable for producing desired results.

Contract Oversight – Monitor and enforce the terms of the contract.

The level of risk associated with each of these elements varies depending on the type of business relationship. For example, the nature and extent of contract monitoring will vary considerably between fee for service and cost reimbursement types of relationships.

General Planning

General Planning includes several areas which assist in getting the project started – such as development of the contract management team, assessing risk, developing a communication plan, determining the procurement method, planning for the content of the procurement, and determining a cost estimate.

Contract Management

Each contract management initiative should include an executive sponsor, a contract manager, purchasing department staff and program staff to assist in the contract management process. The extent and degree of executive sponsorship and participation should be directly related to the level of risk associated with the procurement. The contract manager should be experienced with the proposed type and size of procurement. Certified purchasers are not contract managers in all cases. However, certified purchasers should be familiar with this Guide. The purchasing department should review all contracts to ensure that purchasing statutes are followed and that the procurement is handled in a fair and competitive environment. The program staff will provide input as to the technical requirements and serve as the subject matter experts for the procurement.

There may be instances where an agency does not have the necessary technical expertise on staff for developing a solicitation. For example, a contract for building construction would need the expertise of a licensed architect and a licensed engineer when preparing plans and specifications for a building. In these instances, if the agency does not have a licensed architect and engineer on staff, they would contract out for that expertise.

Risk Management

Risk management is a three part process: 1) identify risk; 2) quantify and analyze the likelihood of and the potential impact of identified risk; and 3) limit or lessen the risk. Contract management risks are as varied as are the types of contracts. Risk categories common to contract management include product risk, process risk, financial risk and schedule risk.

There is not an objective or mathematical formula that can be used to identify or quantify the risk imposed by a particular contract. Risk determination is based on subjective experience. Several factors that may be useful in identifying the level of risk may include:

- The complexity and subject matter of the procurement;
- The dollar amount of the procurement, and whether the procurement will result in a major contract;
- The anticipated payment methodology;
- The experience the agency staff have with the type of procurement;
- Whether the results of the procurement will impact the public or only impact the agency;
- Time constraints or the expected duration of the procurement; and
- The type, availability or experience of staff resources required to implement the objectives of the procurement.

The table below provides examples of the various degrees of risks associated within specific procurements:

CONTRACT FACTOR	LOW RISK	HIGH RISK
COMPLEXITY	Film Processing Services	Service contract for software development program

CONTRACT FACTOR	LOW RISK	HIGH RISK
DOLLAR AMOUNT	\$500	\$1,000,000
PAYMENT METHODOLOGY	Firm Fixed Price	Cost plus % of savings
EXPERIENCE OF AGENCY STAFF	Office Supplies	Outsourcing of Information Technology functions
IMPACT TO PUBLIC OR AGENCY	Janitorial Services	Outsourcing of Foster Care Management Services
TIME CONSTRAINTS OR CONTRACT DURATION	14 day delivery of paper	Implementation of new program to meet legislative mandate

A preliminary risk assessment should be conducted to make an initial determination about the level, type and amount of management, oversight and resources required to plan and implement the contract from beginning to end. Simply put, as the risk associated with a particular procurement increases, the level and degree of executive management's sponsorship, participation and oversight should be increased by a corresponding level. See Chapter 7 – Contract Administration for a sample Risk Assessment.

A high risk contract such as a cost-plus percentage of profit arrangement, an outsourcing project or software development procurements should involve significant executive management sponsorship, participation and oversight. A low risk contract, such as routine purchases of goods or services does not typically require the participation or sponsorship of agency executive management.

Risk assessment is an ongoing process. Risk should be reviewed and re-evaluated by the contract manager on a continual basis until the contract is fully performed and final payment is made.

The primary approach to managing risk after a preliminary risk assessment level is to document the initial perception of the level of risk and or specific risks that are identified, identify and assign experienced staff resources to assist in the contract management process.

Communications Plan

Agencies should develop a plan to manage and control internal and external communication. After identifying internal and external stakeholders (executive management, oversight entities, etc.), determine the type, content and frequency for reporting status. Develop and report against a timetable with key decision points and milestones to communicate status. Determine who, what, when, where and how information will be communicated to the contractors regarding the potential procurement opportunity.

Determining the Procurement Method

At this point it is important to determine the procurement method as it will be a major factor in the planning process. For example, the procurement lead time for an Invitation for Bid and a Request for Proposal differ significantly.

- Invitation for Bids (IFB) - The IFB uses the competitive sealed bid method. This method is used when the requirements are clearly defined, negotiations are not necessary and price is the major determining factor for selection. Best value considerations can also be used with the IFB method. Invitation for Bids is covered in the Procurement Manual.

- Request for Information (RFI) - Requests for Information are used primarily as a planning tool. The RFI is an optional method that may be used to gather information in order to prepare a complete and accurate solicitation document when an agency does not have the necessary information to prepare a complete and accurate solicitation document. RFI's are used to identify industry standards, best practices, potential performance measures, and cost or price structures or to generally ascertain the level of interest of prospective respondents. A preliminary solicitation document which provides an initial description of the program objectives and specifications usually accompanies an RFI for review by potential respondents. Agencies may use the information derived from the responses to finalize their solicitation document. Agencies are not required to incorporate any or all of the comments or suggestions made by the contractor, but the hope is that the contractor will provide useful information in the RFP development process.
- Request for Offer (RFO) – Generally used for IT Commodity Purchases exempt from the DIR IT Commodity Program. The process is generally the same as the RFP process. Request for Offer purchases include the purchase of automated information systems and are covered under Texas Administrative Code, Title 34, §20.391.
- Request for Proposal (RFP) – Used when competitive sealed bidding is not practicable or advantageous. Generally this is when factors other than price are to be considered or when objective criteria cannot be defined. One of the key differences between an IFB and an RFP is that negotiations are allowed in an RFP. Discussions are allowed with the respondents and best and final offers are solicited. Unless otherwise exempted, agencies must submit their RFPs to CPA for review prior to solicitation.
- Request for Qualifications (RFQ) – Generally used for Professional Services wherein the respondents are evaluated based solely on their qualifications. Price is not considered until after selection is made by the agency based on qualifications. Professional Services are covered under Texas Government Code §2254 at: <http://tlo2.tlc.state.tx.us/statutes/gv.toc.htm>.

The table below is provided to assist in making the appropriate choice in selection of a procurement method. As a reminder, agencies should first refer to any applicable statutory requirements which may direct them to use a specific procurement method.

Procurement Method	Use When	Advantages	Disadvantages
Competitive Bids (Invitation for Bids)	Lots of competition exists. The product or service is available from more than one source.	Award process is simpler. Award is made to the lowest responsive, responsible bidder providing the best value to the State.	Defined specifications may be difficult to develop. Does not encourage innovative solutions.
Competitive Proposals (Request for Proposals, Request for Offer)	When factors other than price are evaluated. When negotiations are desired. Vendor is expected to provide innovative ideas.	Allows factors other than price to be considered. Allows for customized proposals suggesting different approaches to the same business need. Allows for negotiations in order to obtain the best	Lead times for procurement are much greater. Evaluations are more complex and subjective.

Procurement Method	Use When	Advantages	Disadvantages
		value for the state.	
Request for Information	There is insufficient information to write specifications for any procurement method.	Provides information to prepare a complete bid or proposal document. Allows the business community to have input into the agency's solicitation document based on current industry practices and market factors. Informs agency of any potential problems early in the procurement.	Lengthens the procurement process.
Request for Qualifications [This method is usually required by statute (e.g. Professional Services)]	Selection is made solely on the skills and qualifications of the contractor. Price is not a factor until after a vendor is selected.	Emphasizes the competency of the proposed contractors.	Contractor is selected before price is negotiated.

Exemptions

Some purchases may be exempt from competitive bidding. Some examples are provided below. Additionally, agencies may be exempt from CPA authority based on their own enabling legislation. For example, the Texas Department of Transportation's enabling legislation exempts highway construction from CPA oversight.

- **Emergency purchases.** Emergencies occur as the result of unforeseeable circumstances and may require an immediate response to avert an actual or potential public threat. If a situation arises in which compliance with normal procurement practice is impracticable or contrary to the public interest an emergency purchase may be warranted to prevent a hazard to life, health, safety, welfare, property or to avoid undue additional cost to the state. Agencies may have specific rules or policies pertaining to emergency purchases. See the State of Texas Procurement Manual for more information on Emergency Purchases (<http://www.cpa.state.tx.us/procurement/pub/manual/2-18.pdf>).
- **Proprietary Purchases.** Proprietary purchases are required to comply with Texas Government Code, Section 2155.083; Electronic State Business Daily posting requirements for procurements estimated to exceed \$25,000 in value. Additionally, a product or service is proprietary if it has a distinctive feature or characteristic that is not shared or provided by competing companies or similar products or services. When the specification requirement limits consideration to one manufacturer, one product, or one service provider, a written justification must be provided and is subject to review by CPA. Proprietary purchases should be placed on CPA's *Electronic State Business Daily*; this provides transparency to the process and gives the entire vendor community the ability to view the specifications and provide de facto agreement to its proprietary nature by not responding. See the State of Texas Procurement Manual for more information on Proprietary Purchases (<http://www.cpa.state.tx.us/procurement/pub/manual/2-21.pdf>).

- **Open Enrollment Contracts.** Potential contractors apply with an agency to contract through an open enrollment process. Vendor eligibility is usually based on previously determined criteria established by state or federal statute or agency rules. The enrollment process is open to new applicants throughout the contract term.

Grants

Grants are usually administered via a contractual agreement between the agency and the party providing the service. Government Code Sec. 2261.002(1) includes grants in its definition of a contract unless certain criteria are met. This guide generally applies to grants as well as contracts. In addition to complying with the requirements of this guide, agencies should also ensure compliance, where applicable, with state and federal laws and regulations, Uniform Grant Management Standards adopted by the Governor's Office of Budget, Planning and Policy, and other program requirements related to the grants that agencies administer.

Planning for Contract Content

Clearly identifying general contracting objectives, assumptions, and constraints is an important step in the contracting process. This step may seem obvious, but when a contract fails, it often fails because the expectations were not met and there was not a true meeting of the minds. A clear understanding of the contracting objectives is essential to success. Typically a contract will be part of a larger organizational project. Agencies must carefully consider how the objectives, assumptions and constraints integrate into the larger organizational project. Identify and document potential integration risks so that a strategy for mitigating or managing those risks will be developed later.

Needs Assessment

The purpose of the needs assessment is to ensure the contracting team plans for the correct contracting objective. A clear definition of the contracting objectives and purpose to be accomplished by the contract is intended to assist the team later in developing the statement of work, solicitation, negotiation and contracting documents, and in verifying the performance of a contractor. This assessment should incorporate the initial needs assessment conducted by the agency when the determination was made to contract out for the service instead of performing it in-house.

If the contracting purpose implements, changes or supports an agency's statutory duties, it is useful to identify existing statutory requirements, agency rules, policies and business processes that will be impacted by the contract. If business processes or practices are not documented, it is often useful to document the business processes. Once the legal requirements and business processes are clearly identified the agency can assess how these duties or processes will be changed or impacted. Document any concerns or risks identified by the assessment so that the changes and risks can be managed or mitigated in the contract document.

The success of many contracts is dependent upon how well business requirements are documented, communicated and understood by the contractor community. Do not assume that the contractor community understands the business of your agency. Detailed agency business practices are frequently incorporated into the statement of work in a contract, so agency staff input and cooperation is critical when planning and developing a statement of work and during acceptance testing.

Well Formed Contracting Objectives and Purpose

A well formed statement of the contracting objectives should provide a general understanding of what will be accomplished by a contractor. Well formed objectives will help guide and keep the contracting process focused and on track.

Technique

Defining the contracting objectives, assumptions, and constraints may sound simple and straightforward, but this definition process can be quite complex. Agencies may find that individuals on the contracting team hold different views as to the procurement's objectives. The following questions are intended to assist the team in clarifying and harmonizing potential divergent objectives and interests. Answering the following three questions will aid agencies in defining and refining the contracting objective:

1. What does your agency specifically need?
2. What will fulfilling this need do for your agency?
3. How will your agency know when the need has been met?

Each procurement is different; therefore the description of the objective, assumptions and constraints will vary. A good measure of the quality of the statement of work is whether the contracting objectives, assumptions and constraints make sense. Are the objectives, assumptions and constraints described too broadly or too narrowly? Could the reader answer the three questions?

Research

Contact and interview people within the agency and other agencies who have developed solicitations, drafted contracts and engaged in contractor oversight similar to the one being planned. Document the strengths, weaknesses, problems and the lessons learned in the interviews. Use the internet to search for copies of solicitation documents, contracts and oversight documents or products used by others. Review websites for useful information. Check with universities, trade associations and professional organizations to identify industry practices, methods, standards and rules that will deliver the goods or perform the services. Another approach to identifying information regarding the availability, features or measures for the purchase of goods or services is to publish a Request for Information (RFI). Potential contractors may respond to the RFI with information that will assist the agency during the contract management process.

While researching, agencies may wish to contact potential contractors to discuss the procurement. This is an acceptable practice as long as the agency solicits information from more than one contractor and advises the contractor up front that the agency's interest at this point is strictly for research purposes and that any formal requests for pricing or other information will be made through the formal competitive sealed bid or competitive sealed proposal process.

Business Model

A business model should represent a high level view of how the intended business transaction is expected to work. The business model may include plans relating to a contract strategy, contract management, and contractor performance monitoring approach, as well as financial assumptions and limitations.

Cost Estimates

During the planning stage of the procurement, it is necessary to develop an estimated cost of the procurement. The cost estimate should assist agencies in determining which type of procurement method to use. Even if limited by budget restraints, an estimated cost will provide an idea of the range of services that the agency can include in the statement of work.

It is recommended that agencies contact someone within the agency who has knowledge in the subject area to assist with the cost estimate. However, if unable to find anyone with knowledge in the subject area, agencies may choose to contact several contractors to obtain pricing information. If contractors are contacted, be sure to advise them that you are obtaining price estimates for information purposes only and that the estimate is not a formal solicitation. In obtaining price estimates from potential bidders, care should be taken to avoid giving a potential bidder a competitive advantage.

Procurement Lead Time

In order to ensure that contracts are processed prior to their effective dates, the table below is provided to assist agencies in the planning process.

TASK	SUGGESTED LEAD TIME FROM CONTRACT START DATE	EXAMPLE
Begin Preparation of Solicitation Document – Program Staff works with agency Purchasing Department to develop scope of work and contract language.	180 days	March 1
Submit final solicitation with required approvals to the Purchasing Department and CPA (when required).	150 days	April 1
Advertise and Issue Solicitation	120 days	May 1
Receipt of Responses	90 days	June 1
Evaluation of Responses	60 days	July 1
Contract Negotiation (if allowed) and Formation	30 days	August 1
Contract Execution – All signatures are obtained.	15-60 days	August 15
Performance Begins (effective date)	0 days	September 1

The lead times above are suggestions only and may vary depending on the specific requirements of your agency and the complexity of the procurement. Less complex procurements may be accomplished in less time, while more complex procurements may require more time. Contact your agency Purchasing Department to ascertain their lead time requirements. Examples of tasks that may lessen or increase the lead time include, but are not limited to:

- Preparation of the solicitation document. This is where the planning and research discussed earlier pays off. Some program staff are more adept at writing scopes of work and proposal documents. This will reduce the time required to prepare the solicitation document. If possible, the Purchasing Department should provide program staff with templates to assist in preparation of solicitation documents. A sample RFP template is included in this Guide. However, agencies should modify the template to meet their own agency's needs and requirements.
- The time required for the Purchasing Department to finalize the solicitation document can vary depending on how well the scope of work is written by the program staff. The Purchasing Department is responsible for ensuring the document is complete, allows for competition, and follows all applicable statutes, rules, and procedures.
- A 30 day solicitation period is typical for most RFPs. Formal IFB's usually require 14 or 21 days, depending on any applicable ESD requirements. However, if the procurement is very complex and requires respondents to submit significant documentation and/or complex pricing, additional time for the solicitation period should be allowed. In addition, if the scope of work is unusual or complex, there may be many questions – in which case an RFP is recommended.
- Evaluation of the proposals may take more or less time, depending on the size of the evaluation team and the complexity of the evaluation. The evaluation period could also increase if oral presentations, discussions or best and final offers are utilized.
- Contract Negotiation and Formation timeframes may vary depending on the complexity of the procurement.
- Contract Negotiation and Formation timeframes may vary depending on the complexity of the procurement.

- Contract Execution – This timeframe may also differ significantly between a purchase order and a contract. Depending on the signature requirements of the agency and the contractor, the contract execution lead time may need to be adjusted.

Technology Addendum

The purpose of the Guide is to offer state agency contract managers recommendations on improving existing contract management processes and practices. Many of the major information resources projects initiated within state government involve procurement of technology-related goods and/or services. Technology-based procurement projects present a unique level of complexity that requires specific contract management practices, processes, and strategies.

Technology Addendum Relation to the Guide

The Technology Addendum supplements and aligns with the Guide. The Technology Addendum content, as developed and maintained by the Department of Information Resources (DIR), is included in the Guide to convey information specific to technology-based procurement projects. Therefore, all information included in the Guide as overarching practices, processes, and strategies for contract management apply to technology contracts. Definition of terminology, ethical standards, legal guidance, and use of the Texas Procurement Manual, also apply.

The major distinctions between information provided in the Guide and the Technology Addendum are:

- (1) The Technology Addendum applies to all major information resources projects as defined in Texas Government Code, Section 2054.003 (10):
any information resources technology project identified in a state agency's biennial operating plan whose development costs exceed \$1 million and that:
 - *requires one year or longer to reach operations status;*
 - *involves more than one state agency; or*
 - *substantially alters work methods of state agency personnel or the delivery of services to clients;**and any information resources technology project designated by the legislature in the General Appropriations Act as a major information resources project*
 Contracts established for procurement of technology-related goods and/or services are included as part of thresholds for a major information resources project.
- (2) The Guide applies to and defines major contracts as contracts that have a value of at least one million dollars during the original term of the contract, not including any renewal periods. The Technology Addendum applies to certain major contracts as required by Texas Government Code, Section 2054.301(b), which include contracts that have a value of at least one million dollars under which a vendor will perform or manage an outsourced function or process. The term "outsourced function or process" relates to a contract for services where to perform the services, the vendor must develop or acquire information resources technologies (as that term is defined in 2054.003 (8)) where the information resources technologies will become a part of the agency's information resources technologies or where the information resources technologies are the principal deliverable(s) under the contract. The term "outsourced function or process" excludes a contract where the information resources technologies deliverable(s) will not become a part of the agency's information resources technologies or where the information resources technologies are not the principal deliverable(s) under the contract.
- (3) The Guide offers, in general, recommendations on improving existing contract management processes and practices. The Technology Addendum conveys required processes and practices for development and management of solicitations and contracts for technology-based procurement projects.

- (4) The Guide offers recommendations to state agency contract managers. The Technology Addendum conveys required processes and practices to contract managers, project managers, technology staff, purchasing staff, and all other staff impacted and involved with delivery of a technology-based procurement project.

Exclusions

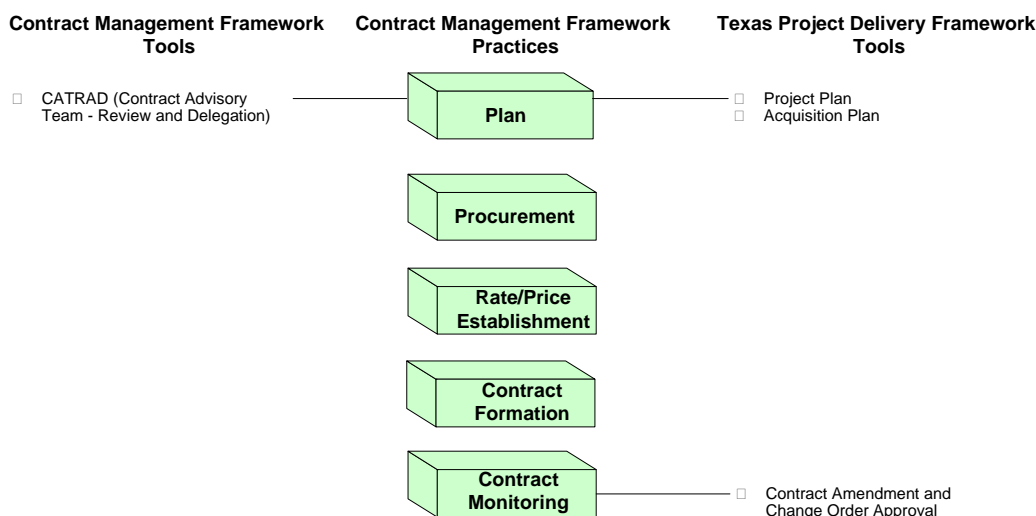
The Technology Addendum excludes addressing technology commodity item purchases available through the DIR Cooperative Contracts Program. Each agency, excluding institutions of higher education, must purchase technology commodity items in accordance with a contract maintained by DIR. Refer to the DIR Web site for additional information regarding technology commodity item purchases.

The Technology Addendum excludes addressing telecommunications purchases available through DIR TEX-AN (TEXas Agency Network). TEX-AN is both the centralized telecommunications system for the state and a family of requirements contracts. Refer to the DIR Web site for additional information regarding TEX-AN contracts.

Texas Project Delivery Framework

The Texas Project Delivery Framework (Framework) establishes a consistent, statewide method for technology project selection, control, and evaluation based on alignment with business goals and objectives. The Framework is required for major information resources projects as defined in item (1) above and for certain major contracts as described in item (2) above. If necessary, agencies may contact the Texas Department of Information Resources by emailing projectdelivery@dir.state.tx.us to request consultation on applicability of Framework requirements to a specific major contract. Refer to the DIR Web site for detailed information regarding Framework guidance and tools for technology-based procurement projects.

One of the Framework review gates is Solicitation and Contracting. The Solicitation and Contracting Review Gate includes development and management of technology-based solicitations and contracts. The Solicitation and Contracting Review Gate activities and the Project Planning Review Gate activities work in conjunction with the practices described in the Guide. Although use of other Framework tools applies to technology-based procurement projects, the following diagram specifically maps practices described in the Guide to Framework contract-related tools.



NOTE: Other non-contract related Framework tools do apply to technology procurement projects.

A Project Plan (Framework tool) must be finalized, approved at the agency level, and submitted to the QAT prior to spending more than 10 percent of the funds allocated to a project and/or prior to issuance of a vendor solicitation for the project. Agencies must use the Project Plan to document planning, management, and control activities that support the project from start-up through closure.

The Acquisition Plan (Framework tool) information is a subset of the Project Plan information and describes the activities to acquire goods and/or services from outside the organization. The Acquisition Plan addresses activities for solicitation planning, solicitation development and posting, source selection, contract award, contract management, and contract closeout. As a subset of project management activities defined in the Project Plan, managing a technology-based procurement project relies on activities (e.g., risk management, change control, project monitoring, performance management) defined in the Project Planning Review Gate.

An Acquisition Plan must be finalized, approved at the agency level, and submitted to the QAT prior to issuance of a solicitation for the project. The agency head must approve contract amendment and change orders if the amendment or change order changes the contract amount above 10 percent or significantly changes the contract completion date as determined by the QAT. The Contract Amendment and Change Order Approval (Framework tool) is used to approve funding for contract amendment and change orders.

As described in the Guide, the CATRAD (Contract Advisory Team – Review and Delegation) tool must be used to submit specific information to CPA before issuance of a solicitation that is anticipated to result in a contract with a value of one million dollars or more.

Preparing the Solicitation

After an agency determines which statutory solicitation method is appropriate, the solicitation document is prepared. (Refer to Chapter 2 for the various procurement types). Keep in mind that except as otherwise provided by statute, a purchase of or contract for goods or services shall, whenever possible, be accomplished through competitive solicitation. In preparing the solicitation document, review the relevant statutes and rules to identify each of the statutory and regulatory requirements necessary to comply with the law before attempting to draft a solicitation document.ⁱⁱⁱ Employees involved in preparing a solicitation should sign and submit a Non-Disclosure Statement (See Appendix 7) and conflict of interest statement prior to beginning work on a solicitation.

Preparing the Statement of Work

The Statement of Work is very important as it forms the basic framework for the resulting contract. The needs assessment discussed in Chapter 2 is the foundation for the Statement of Work. The Statement of Work is a detailed description of what is required of the contractor to satisfactorily perform the work. The success or failure of a contract can usually be linked to the adequacy of the planning, analysis and thoroughness of the statement of work. Time spent planning, analyzing, and drafting the statement of work will result in saving time, resources, money and will improve the quality of the goods or services provided. It is very important that the statement of work:

- Secure the best economic advantage utilizing best value;
- Be clearly defined;
- Be contractually sound;
- Be unbiased and non-prejudiced toward respondents;
- Encourage innovative solutions to the requirements described, if appropriate; and
- Allow for free and open competition to the maximum extent reasonably possible.

Specification Types

There are many types of specifications. (<http://www.window.state.tx.us/procurement/pub/manual/2-23.pdf>) This Guide will focus on two (2) of the most common types: Performance Based Specifications and Design Specifications.

Performance Based Specifications vs. Design Specifications

Performance based specifications focus on outcomes or results rather than process, and the required goods and services rather than how the goods and services are produced. Conversely, design specifications outline exactly how the contractor must perform the service or how the product is made. Performance based specifications allow respondents to bring their own expertise, creativity and resources to the bid process without restricting them to predetermined methods or detailed processes. This allows the respondents to provide the product or service at less cost and shifts some of the risk to the contractors. For example, if a state agency utilizes a design specification for a unit of laboratory equipment, and the equipment does not work correctly, then the results may be the fault of the specification. However, if the agency wrote a performance based specification, the unit must operate properly in order to meet the performance standards.

For example, consider the purchase of media and advertising services:

Performance Based Specification: Contractor shall provide media services for Texas Tourism which shall increase the tourist dollars by a minimum of three (3) percent in the next fiscal year. Visits by out of state tourists shall increase a minimum of ten (10) percent. These figures will be measured as reported by the Texas Chamber of Commerce.

Design Specifications: Contractor shall conduct at least seven (7) media campaigns for Texas Tourism during the fiscal year. Three (3) of these campaigns must be directed to out of state tourists.

Mixed Specifications: Contractor shall provide media services for Texas Tourism which shall include a minimum of seven (7) media campaigns during the fiscal year. Media services shall provide for a minimum increase of three (3) percent in the next fiscal year as measured and reported by the Texas Chamber of Commerce.

As you can see, the performance based specification focuses on results, whereas the design specification focuses on resources. With design specifications, the contractor may provide all seven (7) campaigns, but the desired result of increased tourist dollars and visits may or may not occur.

As with all performance measures, agencies must ensure that performance specifications are reasonable and measurable. Note that the specification clearly outlines how the results will be measured. While performance based contracts are sometime preferable, when using this type of specification the planning, expertise and contract management may be different than design specifications.

Design specifications are appropriate for simple purchases of goods such as paper, pens, furniture, and services such as temporary staff. Usually these purchases are accomplished by defining specific quantities and specifications for the goods or services, price per unit, as well as requirements for the time, place and manner for delivery and acceptance.

Incentives: Many agencies now include incentives in their contract language. Incentives are used for outstanding performance which exceeds the goals contained in the contract. For example, if state tourism dollars increased by five (5) percent, the contract language sets forth a pre-established monetary incentive for increases above the required three (3) percent.

Performance based specifications are fashioned so that respondents are allowed maximum flexibility when satisfying the requirements of a solicitation whereas, design specifications limit flexibility. It is not always beneficial to use performance based specifications. Examples of when to use performance or design specifications are provided below:

- **New installation, entire system provided by one vendor.** A performance based specification should be used as it will allow the most economical solution to be applied since it is an entirely new system.
- **New installation, system provided by various suppliers.** In this case, the agency may need to use a design specification to ensure that all of the characteristics of the system will work together. For example, a project to bid out the HVAC controls, chillers, fire alarms, etc. will all need to work together.

- **Expansion of an existing installation.** A design specification would be required in this instance as the new equipment must connect and integrate with the existing system.

Organization of the Statement of Work

One way of organizing the statement of work is to divide each of the general contracting objectives into logical parts. Contracts, like projects, are often divided into phases, such as planning, development, implementation and operation or planning, equipment, installation, testing, operation and maintenance. The specific phases should support the subject matter and purpose of the contract. Phases can be further divided into small components of work (segments) and deliverables can be defined within each segment.

Elements of a Deliverable

Each deliverable in a solicitation should include the following elements:

1. A description of the work.
2. A standard for performance.
3. Test conditions, method or procedure to verify that the deliverable meets with the standard.
4. A method or process to monitor and/or ensure quality in the deliverable.
5. An acceptance process for each deliverable.
6. A compensation structure that is consistent with the type and value of work performed.
7. A contractual remedy, if appropriate.

The statement of work should provide a clear and thorough description of the goods or services to be provided. If appropriate, provide the relevant environment where the product/service will be used. In certain types of procurements, it may be critical to describe the existing business processes. If the existing business process will change as a result of the procurement, then also describe what the business process will be after the procurement objectives are completed. If agencies want the respondents to suggest new business processes, ensure that this information is included in the solicitation.

Contract Term

A reasonable contract term compliant with all applicable law must be established prior to solicitation and must be included in the solicitation document. All contracts must have a specific ending date. Indefinite contracts are generally prohibited. As a general policy, it's recommended that the maximum time for contracts without reissuing a competitive solicitation be four (4) years. This includes any renewal or extension periods. Individual business needs may dictate a different period and agencies should consult their legal counsel for advice on this matter early in the planning process.

Contracts which extend into the next biennium must include a “funding out” clause:

This contract is contingent upon the continued availability of funding. If funds become unavailable through lack of appropriations, legislative budget cuts, amendment of the Appropriations Act, state agency consolidations, or any other disruption of current appropriations, provisions of the Termination Article shall apply.

In addition, state agencies are prohibited from incurring obligations in excess of amounts lawfully appropriated by the Texas Legislature over the course of a biennium. See Excess Obligations.

(<http://www.window.state.tx.us/procurement/pub/manual/2-24.pdf>)

Additional information regarding contract terms are discussed in Chapter 6 – Contract Formation.

Historically Underutilized Business (HUB) Requirements

Agencies are required to make a good faith effort to utilize HUBs in state contracts in accordance with the goals specified in the 1996 State of Texas disparity study. These goals can be achieved through contracting directly with HUBs or indirectly through subcontracting opportunities in accordance with Texas Government Code, Chapter 2161, Subchapter F and section 111.14 of the Texas Administrative Code.

For all contracts over \$100,000, HUB subcontracting forms must be completed and returned with the bid or proposal or the proposal will be considered non-responsive. A sample form is included on Exhibit 1, Appendix A of this guide. Specific HUB procedures are detailed in the Texas Comptroller of Public Account's (CPA) Procurement Manual at <http://www.window.state.tx.us/procurement/pub/manual/>.

Payment Types

The method of payment has a direct impact on how the statement of work is written and how the contract is managed. Agencies must measure or verify that the work is complete and how much and how often the agency will pay the contractor. As with specification types, there are also many payment types. The payments should be consistent with the type of product or service delivered. Payments should be structured to fairly compensate the contractor and encourage timely and complete performance of work. As a general rule, payment should be approximately equal to the value of the completed work.

COMMON TYPES OF PAYMENT

Payment Type	Commonly used for:	Payment based on:
Cost Reimbursement	<p>Client services contracts, usually associated with state and federal grants.</p> <p>Example: Contracts for services in remote areas.</p>	<p>Reimbursement of allowable costs in accordance with the approved budget. See the Uniform Grants Management Standards published by the Governor's Office. (www.governor.state.tx.us/division/stategrants/guidelines/view)</p> <p><i>See Note¹</i></p>
Cost Plus Incentives	<p>Materials contracts wherein the materials are unknown at the time of contract award.</p> <p>Example: Construction contracts</p>	<p>Contractor's cost plus a percentage of cost or cost plus a fixed fee. This type of payment is usually discouraged as there is no incentive for the contractor to minimize the cost to the State.</p>
Fee For Service	<p>Contracts wherein a fee can be established for a unit of service.</p> <p>Example: Providing flu shots to patients. Unit of service is one flu shot.</p>	<p>A specific fee for a unit of service. Payments are made for each unit of service completed.</p>
Firm Fixed Price	<p>Contracts wherein a firm fixed price can be established for work to be performed. Requires that the statement of work provide clear and accurate specifications.</p> <p>Example: Common goods and services such as office supplies, furniture, etc.</p>	<p>A firm fixed price at the time the contract is awarded. Contractor carries all risk as the payment does not change, regardless of how much it costs the contractor to provide the goods or services.</p>
Firm Fixed Price with Escalator	<p>Same as above and for longer term contracts and or contracts where the costs of material and labor are subject to market fluctuations. Because the contract allows for market adjustments, contractors are less likely to inflate prices to protect themselves against possible increases in operating costs.</p> <p>Example: Lumber, steel, paper</p>	<p>Same as above except includes a provision for price escalation. Escalators are typically based on the Consumer Price Index.</p>
Progress (not allowed in client services contracts)	<p>Construction contracts or contracts that are completed in phases or stages.</p>	<p>Payment is based on pre-established deliverables. Deliverables must be measurable. <i>See Note²</i></p>

Payment Type	Commonly used for:	Payment based on:
	Example: Building Construction, Consulting Services	
Time and Material	<p>Labor contracts wherein the amount of labor or material required for the work cannot be forecast. Recommend other payment types if possible. For example – instead of paying the contractor \$25 per hour for labor plus the cost of the materials, establish pricing for common units of work such as “labor and material to install a 120 power outlet”.</p> <p>Example: Electrician, plumber, carpenter, etc.</p>	Payment is based on the number of hours worked for a specific scope of work, i.e. install a 120 power outlet.

Note¹: Agencies may reference the State of Texas Travel Allowance Guide published by the Comptroller of Public Accounts when including travel costs as an allowable expense within a contract. (<https://fmxc.cpa.state.tx.us/fm/pubs/travallow/index.php>)

Note²: For example, a contractor has a contract to conduct an analysis of a specific business process and prepare a report with recommendations for improvement. A method of payment might be that the contractor is paid 30% of the contract amount upon completion of the analysis. The agency must specify what documentation will be required to indicate proof of this deliverable, such as a copy of the analysis. The remaining 70 percent is paid upon receipt and acceptance by the agency of the final report. It is important to note that with this payment type, agencies must be careful not to shift the financial risk to the State by paying the contractor for more than the amount of work the contractor has completed. Agencies must also consider the importance of the deliverable. In the above example; the agency may agree to pay the contractor 80 percent of the contract amount upon completion of the analysis since the analysis takes a significant amount of labor. This change shifts the financial risk to the State because the agency has paid for 80 percent of the service, but will have nothing to show for the dollars spent if the contractor fails to complete and submit the report and recommendations.

Good business sense suggests that each payment should reflect the value of the work performed. Agencies can control the payment process by dividing the overall contract payments into smaller amounts that each reflect a small increment of work or deliverable. This is an effective technique for managing financial risk. If there is a dispute, by using the deliverable elements, the scope of the dispute can be contained to a discrete deliverable rather than the entire contract. Likewise, the amount of money associated with the deliverable is also known and limited. In slightly different ways, each of the deliverable elements either lessens risk or shifts risk from the State to the contractor.

Chapter 6 - Contract Formation contains a detailed explanation of the required elements of a contract.

Define the Agency's Role

Clearly define the role the agency will play in the work to be performed and any specific contributions, resources or tasks the agency will provide. Detail any background data or work already accomplished that the anticipated contract will build on and make it available during the solicitation phase of the procurement. Specify whether the contractor should rely on the accuracy of any such background data or work or whether the data or work is provided for information purposes only. If provided for informational purposes only, advise if the contractor is responsible for verifying the accuracy of the information to the extent necessary to perform the contract. Define the roles of the agency staff that will administer the contract and monitor the contractor's progress.

Quantity

The solicitation document must quantify the amount, frequency and/or location required to meet performance.

Quality

The solicitation document must identify the level of quality required for acceptable performance. For example: *All dusting shall be done so as to ensure cleanliness of surfaces, as determined through inspection by the contract administrator.*

Established Standards

If established standards (international, national, state, local) are available, they can be used to assist in defining the contract performance requirements. Examples of national and international standards include American National Standards Institute (ANSI), American Society for Testing and Materials (ASTM) and International Organization for Standardization (ISO). Using established standards provides consistency in measuring acceptability, quality or accuracy of the performance of one or more parties to a contract^{ix}

Contracts will often incorporate by reference “standards” maintained by entities representing particular industries such as Generally Accepted Accounting Principles (GAAP), Institute of Electrical and Electronic Engineers (IEEE) or ISO. If a standard is incorporated by reference, identify any industry, state or agency standards of performance that relate to each activity, task, work product or deliverable. Merely referring to “industry standards” is usually inadequate. If an industry standard is used, specifically identify the standard by number.

Warranty as a Standard

A warranty is a type of standard that can describe performance.^x Consider including warranty language as a contractual standard of performance. An express warranty and an implied warranty are technically different. However, each standard works to describe a type of contractually based performance.^{xi}

Unless excluded or modified by the language in the contract, warranties or standards may be implied or imposed into a contract by a statute or case law. For example, in the sale or lease of some types of personal property or goods there may be statutory warranties implied into a contract, such as: a warranty of title^{xii}, a warranty that the goods shall be merchantable^{xiii}, or a warranty that goods are fit for a particular purpose.^{xiv}

The best practice is to include clear standards for the contractual performance or an express warranty describing the objective expectation of performance rather than relying on an implied warranty. Generally, it is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that the seller have a specific intention to make a warranty. However, a mere affirmation of the value of the goods or a statement merely purporting to be the seller’s opinion or commendation of the goods does not create a warranty.

Contractor Qualifications

The statement of work should specify the minimum qualifications required of the contractor. Typically in an RFP, the contractor qualifications are less stringent than in an IFB because the contractor qualifications are part of the evaluation criteria. At a minimum, the statement of work should require that the contractor have a specified level of experience in the type of work to be performed.

Bonding Requirements

The three (3) most common forms of bonding are bid bonds (deposits), performance bonds and payment bonds. Agencies must advise the respondents in a solicitation if a bond is required and what forms are acceptable (e.g., irrevocable letter of credit or cashier’s check). When considering whether or not to use a bond, remember that the cost of the bond is typically passed on to the agency by the contractor. Some bonds are required by statute for specific types of procurements. Please consult with your attorney if you have any questions about bonding requirements.

Evaluation Criteria

The solicitation document must advise the respondents how a proposal will be evaluated. The evaluation criteria must reflect the essential qualities or performance requirements necessary to achieve the objectives of the contract. The

criteria should allow the evaluation team to fairly evaluate the proposals. The evaluation criteria may take a variety of sources of information into consideration such as the written response, the oral presentation, documented past performance of the respondents and references relevant to the contract. Specific portions of the required response should directly relate to the evaluation criteria.

To ensure fairness in evaluation, the evaluation criteria should reflect only those requirements specified in the solicitation document. The language within the solicitation will determine the scope of the evaluation criteria and the flexibility the evaluation team will have when evaluating proposals, so the evaluation criteria should not be unduly restrictive. Respondents must have notice in the solicitation of all requirements. The solicitation should clearly state the consequence of failing to meet these requirements such as reduction in evaluation score or disqualification. Consider carefully any requirements that may disqualify a proposal. For example, the HUB Subcontracting Plan is required by state statute, therefore, agencies have no choice but to disqualify the respondent if they do not submit the plan. However, if the respondent fails to submit a copy of a license, is that really a valid reason for disqualification?

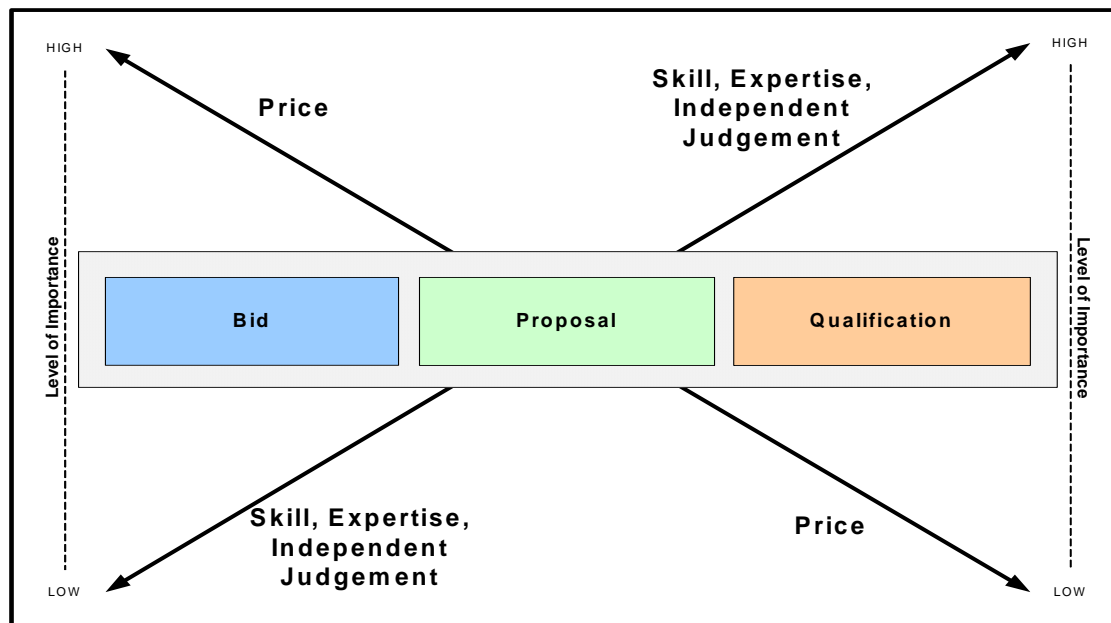
Criteria that was not included in the solicitation may not be used in the selection or ranking of a proposal. For example, if respondents receive additional points for possessing a national accreditation, or meeting the unique needs of the customers, these criteria must be included in the solicitation so that the respondents know there is an opportunity to score higher by providing these options. Likewise, if this information is not requested in the solicitation, respondents who fail to offer these options cannot be penalized.

There are several schools of thought on how much information is provided to the respondents regarding the evaluation criteria. At a minimum, the criteria must include the weight assigned to each criterion. Some agencies prefer to give more detailed information as to how each criterion is broken down into smaller units or they include a copy of the evaluation scoring sheets with the solicitation. Either approach is acceptable.

When determining the evaluation criteria, also consider the proposal submission requirements associated with each criteria. In the sample criteria listed below, methodology is a criterion on which the respondents will be evaluated. What information needs to be included in the response in order to effectively evaluate a respondent's methodology – did they copy a project management technique straight from a training manual, or did they tailor this technique specifically to meet the needs of the solicitation? Another example is experience, skills and qualifications of company and staff. What information is required for the evaluation team to score this criterion – years in business, years of staff experience, certified or licensed employees, performing similar size projects, etc? The table below indicates sample evaluation criteria:

SAMPLE EVALUATION CRITERIA	SAMPLE WEIGHT
Cost	60%
Proposed services, including work plan and methodology.	20%
Experience, skills and qualifications of company & staff.	20%

Cost is typically the most significant evaluation factor. However, there are procurements in which the skills and experience of the contractor or other factors may be more important than cost. For example, if a trainer has to have a specific set of skills, the agency may be willing to pay more for these skills. When establishing the criteria weight, consider the importance of the criteria to the overall project. The criteria deemed most important by the agency should be weighted higher than the other criteria. The following diagram demonstrates the relationship of the evaluation criteria and the level of importance.



Source: Office of the Attorney General

Best Value Considerations

Best value considerations should also be included in the statement of work. The lowest cost is not necessarily the best value for all procurements. For example, a commodity or service of higher quality, such as a longer life span, may be a better value and investment for the State of Texas, even if the initial cost is more. Agencies need to think strategically when considering their procurement needs. Do not make the mistake of obtaining only what is necessary to meet the immediate needs of the agency. Ask “What is the desired outcome of the procurement” and “What is the best way to achieve this outcome?”

For example, consider the purchase of a heating and air conditioning unit. Agencies should consider the total cost of ownership when purchasing these units. Average life span of the unit, electricity consumption, maintenance record of the unit and parts availability are just a few considerations when looking at the total cost of ownership. In addition, agencies might consider the qualifications and availability of the service technicians and the vendor’s performance history. (See CPA Vendor Performance Tracking System)

(<http://www.window.state.tx.us/procurement/pub/manual/2-50.pdf>)

Several statutes refer to the use of best value in procurements.^{xv} Refer to these statutes before including best value considerations in your solicitations. Some items which may typically be considered under best value include:

- Installation costs
- Life cycle costs
- The quality and reliability of the goods and services
- Delivery terms
- Indicators of probable vendor performance under the contract such as past performance (see above), the contractor’s financial resources and ability to perform, the contractor’s experience or demonstrated capability and responsibility, and the contractor’s ability to provide reliable maintenance agreements and support
- The cost of any employee training associated with a purchase

- The effect of a purchase on agency productivity
- The contractor's anticipated economic impact to the state or a subdivision of the state, including potential tax revenue and employment
- Other factors relevant to determining the best value for the state in the context of a particular purchase.

Proposal Submission Requirements

The solicitation document should include one section listing all of the required information that respondents must submit with their response. This will assist respondents in ensuring required documentation is submitted with the proposal. Additionally, recommended or required proposal formats should be specified in this section, such as page number limitations, size of paper, number of copies, etc. As stated previously, ensure that the solicitation document requests information on those items to be evaluated. For example:

Evaluation Criteria	Solicitation Requirement	Submission Requirement
Contractor Qualifications	Licensed Architect	Copy of License
Contractor Experience	Minimum of five (5) projects of similar size and scope	Detailed information regarding building size, dollar amount and scope of project for each individual project and any additional information necessary to evaluate contractor experience.
Financial Capability	Financially capable of handling a project of this size and scope.	Copy of latest financial statements, including balance sheets, Dunn and Bradstreet report, etc.
Proposed Services	Business Plan for how proposed services will be performed.	Business plan should include, the number of staff resources and experience level, implementation strategy, reporting requirements, response times, etc.

Monitoring

The methods used to monitor contractor performance should be clearly stated in the solicitation. Forcing a contractor, without prior knowledge, to produce time-consuming reports or maintain stringent testing requirements outside normal industry parameters is grounds for legal challenge. It is important that agencies develop and include a monitoring strategy in the solicitation.

The amount of monitoring should be balanced and adequate to meet the need, but limited in type, scope and frequency sufficient to achieve the desired result without unnecessarily increasing costs. Overly restrictive oversight can interfere with the contractor's ability to accomplish the work and may unnecessarily and inadvertently increase the cost of the work.

The statement of work should set specific deadlines for completion of tasks and a schedule for submittal of deliverables, required meetings, presentations or other activities. The contract manager must consider monitoring methods to ensure the contractor performs as specified in the statement of work.

Additionally, different funding sources such as federal grants may have specific requirements for contract monitoring. The contract manager must be familiar with these requirements and include them in the statement of work.

Further discussion on contract monitoring is covered in Chapter 7 – Contract Administration.

Reporting

Status reporting, performance and activity reporting are terms used to describe information that a contractor must provide to show the status of a contract. These terms must be defined in the statement of work and the definition of each should include content, frequency and audience for each report.

A status report describes the level of completion of the work and/or the cost of the contract. Percent complete is often used to describe status. For the report to be useful, a baseline should be established for timelines and budgeting.

If deliverables are specified, include the format of the deliverable and the number of copies required. For example, if a deliverable is a final project report, state how many copies of the report are needed and specify the format of the electronic copy. State all items that must be included in the report. These requirements are usually addressed in the statement of work within the solicitation document.

If vendor provided information is anticipated to be reported as part of the agency's performance measures, ensure that there are requirements that allow for data verification and that the data corresponds with the data required for the performance measures.

If possible, include in the solicitation document the desired format or a sample of any required reports.

Final Acceptance

The statement of work should clearly define how the agency will determine that the contract has been satisfactorily completed. The statement of work sets a standard for acceptance of the deliverable and establishes a procedure to receive or reject the deliverable based on specific factors.

Tracking the status of several phases, segments and deliverables, where each deliverable may have multiple tasks, activities, and products, can be challenging. A formal acceptance process for each step in a contract allows a contract manager and the contractor to know the conditions of contract performances.^{xvi}

Additional Issues to Consider

Listed below are additional issues which agencies should consider when writing the statement of work. These items may affect pricing, so it is important that respondents are aware of these requirements. The statement of work answers – who, what, when, where, why and how. If these questions are answered, it is a reasonable assumption that the statement of work is complete.

- Inspection and testing requirements
- Licenses or permits required
- Use of state agency equipment
- Storage space for contractor materials/supplies
- Intellectual property/copyright issues
- Subcontractor requirements
- Insurance requirements
- Conflict of interests/organizational restrictions

Advertising the Solicitation

Marketing a Solicitation

When marketing a solicitation, consideration must be given to the type of procurement method used. For example, the advertising requirements of goods and services are different from those of building construction or client service contracts. Agencies should refer to the appropriate statute to ensure the proper advertising procedures are followed. Below is a table to assist in determining the appropriate advertising procedure.

Advertising Methods

Type of Procurement	Applicable Statute*	Advertising Method(s)
Common Goods and Services, including Catalog Information Systems.	Texas Government Code, Sections 2155 & 2166	Centralized Master Bidder's List Electronic State Business Daily
Professional and Consulting Services	Texas Government Code, Section 2254	Texas Register Electronic State Business Daily
Building Construction	Texas Government Code, Section 2166	Texas Register Newspaper Electronic State Business Daily

*If not covered by one of these statutes, some agencies may have their own enabling legislation regarding procurement authority. Agencies should review their enabling legislation in addition to the statutes referenced above.

The Centralized Master Bidders List (CMBL) (<http://www.window.state.tx.us/procurement/pub/manual/2-33.pdf>) is an electronic mail list which is administered by CPA. See the website for specific requirements on when to use the CMBL.

The Electronic State Business Daily (ESBD) (<http://www.window.state.tx.us/procurement/pub/manual/2-33.pdf>) is an internet based website for posting state bid opportunities. It is also administered by CPA. **All** bid opportunities of an estimated value of \$25,000 or greater must be posted on the ESBD for a required amount of time. Agencies must be familiar with the requirements of the ESBD as failure to properly post a bid opportunity will void any resulting contract.

The *Texas Register* is used to advertise various types of procurements, such as some professional and consulting contracts and some building construction contracts. Refer to each agency's enabling legislation or the Procurement Manual to determine if Texas Register publication is required. The *Texas Register* is administered by the Secretary of State's Office. <http://www.sos.state.tx.us/texreg/index.shtml>)

Advertising bid opportunities in local newspapers is required for some types of procurements, such as certain types of building construction projects. Refer to the applicable statutes to see if newspaper advertisement is required for a particular procurement.

Solicitation Announcements / Developing the Bid List

Announcements are an efficient way to reduce mailing costs when publishing large solicitations. If agencies are required to use the CMBL, agencies must send a copy of the solicitation to all vendors on the CMBL bid list for the advertised commodity code (http://www2.cpa.state.tx.us/com_book/index.html). There may be several hundred names associated with a particular commodity code. An announcement is a one page document sent to all vendors on the CMBL advising them of the upcoming bid opportunity. The vendor is requested to complete the document and fax it back to the agency if they are interested in receiving a copy of the specific opportunity. An example of an announcement can be found in Appendix 2. When the solicitation is mailed, it is only mailed to the vendors who responded to the announcement.

Solicitation Conferences

Agencies may conduct mandatory or voluntary solicitation conferences. Agencies should carefully consider the use of mandatory conferences as this may limit competition. Conferences should be mandatory only if an on-site visit is required to have a full understanding of the procurement or if the solicitation is so complex that agency staff believes attendance is critical for potential respondents to fully understand the procurement. Solicitation conferences provide a forum for agency staff to respond to questions regarding a solicitation. The benefits derived from conducting solicitation conferences include:

- The conferences allow potential respondents to address specific questions or concerns with the solicitation. If any issues are identified at the conference, the agency will publish an addendum to the solicitation.
- Conferences are important when there is a need for on-site visits by contractors prior to submitting their response. In some cases, it may be sufficient to take digital pictures of the sites and provide this information in a slide presentation at the conference in lieu of the conference attendees traveling to the various sites. A copy of the slide presentation can be provided to the conference attendees and is posted on the ESBD, if required.
- Conferences provide a forum for agencies to provide additional information, schematics, plans, reports, or other data that is not easily transferable or distributed through hard copy.
- All potential respondents have the opportunity to receive the same information so all respondents are on a level playing field.
- Subcontracting relationships may develop through the contacts established at the conferences.

The solicitation document must indicate the date, time and location of the conference. The conference is usually held approximately ten (10) days after the solicitations have been published. All conference attendees must be documented through a sign-in sheet. This is especially important if the conference is mandatory because the sign-in sheet is the document used by the agency to verify respondent attendance at the conference.

The Purchasing Department should conduct the conference, in coordination with the program staff. The Purchasing Department should facilitate the meeting and answer procurement related questions, while the program staff responds to the technical questions. It may not be possible to answer all questions at the conference. In these circumstances, the answers are followed up in writing. It is recommended that the Purchasing Department record minutes of the solicitation conference.

All changes to solicitations must be made through an addendum issued by the agency. The addendum is provided to all potential respondents, usually by posting to the ESBD. When issuing an addendum, consider the amount of time remaining until the opening date of the solicitation. It may be necessary to extend the bid opening or proposal deadline – which can also be done through the addendum process.

We recommend that conferences be audio or video-taped for future reference. Below is a typical agenda for a solicitation conference:

- Opening – Purchaser introduces agency representatives and explains their roles in the procurement.
- Introduction – Attendees introduce themselves and identify the company they are representing.
- Solicitation Overview/Review – This is the main focus of the conference. The document is reviewed page by page or section by section. It is not necessary or recommended to read the entire document, but the entire document should be addressed. Questions should be answered as the pages or sections are discussed.
- Closing Summary – Summarize the changes that were agreed to be made through the issuance of an addendum. Review any unanswered questions to be addressed at a later date. Remind attendees that no oral changes are binding; the changes must be in the form of a written addendum.

See Appendix 3 for Pre-Solicitation Conference Guidelines.

Communication with Respondents

All communication with potential respondents should be made only through the Purchasing Department or other designated staff. The program staff should not have contact with potential respondents outside of solicitation conferences. Likewise, a respondent that contacts someone other than authorized staff in regards to a solicitation may be disqualified. While the Purchasing Staff or other designated staff may not be able to answer all of the technical questions asked by potential respondents, they will ensure that the information is provided to all potential respondents. The solicitation document should only provide a purchasing point of contact with all applicable forms of communication such as telephone, email, etc. Should a potential respondent contact program staff, program staff must politely decline to discuss the procurement and forward the inquiry to the appropriate purchaser.

Written Questions

The solicitation document may invite respondents to submit written questions concerning a solicitation. This option may be in addition to or in lieu of a solicitation conference. The date and time for submission of written questions should be specified in the solicitation document, if applicable. Written questions may be submitted by mail, facsimile, email or hand delivery.

If the solicitation is posted on the ESBD, the questions and answers should be posted with the solicitation document as they become available.

Solicitation Submission and Opening

The solicitation documents must indicate the date, time and location of the public opening. The procurement manual covers the procedures for receipt (<http://www.window.state.tx.us/procurement/pub/manual/2-36.pdf>) and opening (<http://www.window.state.tx.us/procurement/pub/manual/2-37.pdf>) of solicitations.

There is a distinction when opening a competitive sealed bid versus a competitive sealed proposal. Proposals are subject to negotiation; therefore prices are not divulged at the opening time – only the names of the respondents are read.

Consulting Services

Texas Government Code, Chapter 2254, Subchapter B, establishes six (6) oversight requirements for state agencies using private consultants. Because different state entities oversee these requirements, the distinctions between them may not be obvious. The statutory guideline for each requirement is:

Requirement	Statutory Reference Government Code, Chapter 2254, Subchapter B	Contact Agency
Notification	Section 2254.028	Governor's Office of Budget Planning and Policy (GOBPP)/Legislative Budget Board (LBB)
30-Day RFP Publication	Section 2254.029	Secretary of State (SOS)
Finding of Fact	Section 2254.028	Governor's Office of Budget, Planning and Policy (GOBPP)
20-Day Selection Publication	Section 2254.030	Secretary of State (SOS)
Archives	Section 2254.036	Texas State Library (TSL)
Payment	Sections 2254.034, 2254.039	Comptroller of Public Accounts (CPA)

Source: Governor's Office of Budget, Planning and Policy

Consulting Services are services that involve studying or advising a state agency under a contract that does not involve the traditional relationship of employer and employee. Major Consulting Services Contracts (\$15,000 or greater) require a finding of fact from the Governor's Office of Budget, Planning and Policy (GOBPP) and publication in the *Texas Register* prior to contract execution. Consulting services have defined procedures for advertisement and award. These procedures are established by the Governor's Office and are located on the Governor's Office Website at

<http://www.governor.state.tx.us/divisions/bpp/guidelines>). Agencies should be familiar with these rules before considering the use of consulting services.

A state agency may contract with a consultant only if: (1) there is a substantial need for the consulting services^{xvii}; and (2) the agency cannot adequately perform the services with its own personnel or obtain the consulting services through a contract with a state governmental entity.^{xviii}

The governor may grant a state agency a limited waiver from the requirements of the consulting statute because of an unforeseen emergency. An “unforeseen emergency” means a situation that suddenly and unexpectedly causes the agency to need the services of a consultant and there is insufficient time to comply with the statute’s requirements, e.g., the issuance of a court order, new legislation, or a natural disaster.^{xix} The Comptroller of Public Accounts has adopted rules that impact contracting for consulting services.^{xx} [http://info.sos.state.tx.us/pls/pub/readtac\\$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=34&pt=1&ch=5&rl=54](http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=34&pt=1&ch=5&rl=54). Other agencies may also have rules or requirements that impact a specific agency’s contracts for consulting services. See also the Comptroller’s Purchase Policies Guide: <http://www.window.state.tx.us/fm/pubs/purchase/>

Professional Services

Contracts for professional services are exempt from complying with the provisions of Government Code, Chapter 2254, Subchapter B:^{xxi} The following services are considered “professional” by this statute.

- Registered architects;
- Registered engineers;
- Optometrists;
- Land surveyors;
- Physicians and surgeons;
- Certified public accountants;
- Registered Nurses;
- Certified real estate appraisers.

Contracted services provided by the above professionals that fall outside their scope of practice may be governed by other procurement requirements. For instance, management consulting services provided by a certified public accountant would not be exempt as a professional service. In order to contract for such services, an agency would follow the consulting services contract requirements.

Some state agencies have statutory authority to acquire professional services not listed above. An example is the Department of State Health Services which is authorized by §12.0121, Health and Safety Code to adopt a rule expanding the scope of professional services.

Mixed Services

When a contract involves both consulting services and one or more other services, an agency must comply with the consulting services requirements when the primary objective of the contract is the purchase of consulting services. For instance, if a contractor proposes to analyze an agency’s information systems needs and develop and implement an automated information system, the primary objective of the contract is not the analysis provided. It is the delivery of a

data information system. This contract is not a consulting contract; therefore, the requirements for consulting contracts do not apply. However, the agency must comply with the purchasing procedures under Chapters 2151-2158, Texas Government Code, administered by CPA.

Governmental agencies are prohibited from using competitive bidding to purchase or award a contract for “professional services”.^{xxii} The selection of a vendor or award of a contract for “professional services” must be based on two criteria:

1. The demonstrated competence and qualifications to perform the services; and
2. A fair and reasonable price. The professional fees under the contract:
 - a. Must be consistent with and not higher than the recommended practices and fees published by the applicable professional associations; and
 - b. May not exceed any maximum provided by law.

Architectural, Engineering or Land Surveying Services

When procuring professional architectural, engineering or land surveying services, agencies must follow special procedures. Agencies must:

1. Select the most highly qualified provider of those services on the sole basis of demonstrated competence and qualifications – no consideration of price at this point; and *then*
2. Attempt to negotiate with that chosen provider a contract at a fair and reasonable price.

If a satisfactory contract cannot be negotiated with the most highly qualified provider of architectural, engineering or land surveying services, the agency must:

- a. Formally end negotiations with that provider;
- b. Select the next most highly qualified provider; and
- c. Attempt to negotiate a contract with that provider at a fair and reasonable price.^{xxiii}

Evaluation and Award

Evaluation Teams

The evaluation team should be comprised of individuals who are stakeholders in the final product or service and/or individuals who have the necessary technical or program expertise. The Purchasing Department representative is usually the team leader for the evaluation team, and serves as a non-voting member. The evaluation team members are typically selected by program staff. It is important to select members of the team who understand the needs of the organization and understand the desired outcome of the procurement. The evaluation team should bring together as much knowledge as possible to ensure the best qualified vendor is selected. It is recommended that the evaluation team have input into the solicitation document, especially the evaluation criteria and assigned weights. The team members should fully understand the requirements of the solicitation and must be able to critically read and evaluate responses and to document their judgments concisely and clearly.

The recommended size of an evaluation team is three (3) to five (5) members. However, some projects may require additional members due to the nature of the procurement. Coordination and management of the evaluation process becomes more difficult as the size of the team increases. To avoid potential individual bias, the team should not be less than three (3) members.

Scoring Matrix

The scoring matrix is used by the evaluation team members to score the individual responses based on the evaluation criteria defined in the solicitation document. The evaluation team scoring matrix should be completed prior to publishing the solicitation document because, when developing the scoring matrix, agencies may see that additions or revisions are needed to the solicitation document. If time does not permit the scoring matrix to be completed prior to publication, **the scoring matrix must be completed prior to the opening and review of the solicitation responses.** See Appendix 14 for a sample scoring methodology.

Team Briefing

Prior to the evaluation team conducting the evaluations, the team leader provides a briefing for the team to outline the team's duties and responsibilities. This may be a separate meeting, but often times is held in conjunction with and just prior to the evaluation. Each member should sign and submit a signed Non-Disclosure Statement (See Appendix 7) to the Purchasing Department prior to engaging in any discussion about, or having access to proposal documents. Team members should be instructed on their responsibilities including the critical nature of confidentiality to the integrity of the evaluation process.

The team leader will review all evaluation criteria with the team members and explain how the evaluation process will be conducted. Communication between team members during the evaluation must be limited to asking questions of the team leader and obtaining information from technical experts to better understand the proposal contents and requirements. Each proposal must be evaluated individually against the requirements of the RFP. Each RFP response is considered independently of all other RFP responses.

A sample agenda for a team briefing is provided in Appendix 6.

Single Responses

To determine why an agency receives only one (1) response to a competitive solicitation, the following actions should be taken:

- Re-review the solicitation for any unduly restrictive requirements.
- Contact some potential respondents to determine why they did not submit a response.

If it is determined that there were unduly restrictive requirements in the specification, it may be necessary to re-advertise the solicitation. Otherwise, the agency should consider the reasons that other responses were not received and determine if it is in the best interest of the state to make an award, to re-advertise with revised specifications, or to determine if a proprietary or single source justification is required.

Responsive Proposals

After all proposals are opened and recorded, the Purchasing Department determines if the proposals submitted are responsive. This is sometimes referred to as an administrative review. At a minimum, this includes the signed Execution of Offer, Invitation for Bid or similar document, HUB Subcontracting Plan and any other required documents such as bid bonds. In addition, the Purchasing Department will review the proposals to ensure that minimum qualifications are met. Consultation with legal counsel is sometimes necessary to determine a proposal's responsiveness.

An administrative review checklist is a good tool for ensuring the proposals are responsive. A sample checklist is provided in Appendix 4. The evaluation team will only be provided with those proposals deemed responsive.

Proposal Evaluation

Once the proposals have been reviewed and deemed responsive, the evaluation team may begin the evaluation process. The recommended method for evaluation is to have all team members in the same room evaluating the proposals at the same time. This will facilitate questions by team members to the purchasing staff or the technical experts. Purchasing staff and technical experts may answer technical questions regarding proposals. For example, if a proposal recommends the use of a software product one of the team members is not familiar with, the team member can discuss the pros/cons of this software with the technical expert. Team members who are unfamiliar with a particular respondent should not ask other team members about their experience with the respondent unless it was specified in the solicitation that factors other than price will be considered in determining which bid or proposal is the best value for the state.

Once the evaluations are complete, the team leader will collect all of the evaluation score sheets and proposals. The team leader totals the score sheets and verifies the accuracy of calculations for input into the final evaluation formula.

If it is apparent that one or more team members' evaluations differ significantly from the majority, the team should discuss the situation to ensure the criteria was clear to all team members and that information was not overlooked or misunderstood. If after this discussion, a team member feels that he/she did not understand the criteria, the proposal requirement, or missed information that was included in the proposal, the evaluator, at his/her own discretion, may revise his/her evaluation score. The team leader must be present during these discussions to ensure that no team member tries to influence the decision of other team members. Under no circumstances should any team member attempt to pressure other members to change evaluation scores.

Typically, the cost information is scored by the Purchasing Department as cost is an objective criteria that can be calculated through predetermined formulas outlined in a spreadsheet. A sample of an evaluation score sheet is included in Appendix 14.

References

The evaluation team may verify any references included in the proposal and conduct any other reference or credit check deemed appropriate. The evaluation team may also use the Vendor Performance System in evaluating past vendor performance.

All reference checks must be documented in writing. The same script or format of questions must be used when conducting reference checks so that the results are consistent and fair to all respondents. A sample reference check form is provided in Appendix 8.

Sometimes it is difficult to obtain information from the references provided, either because the references have a policy of not providing reference information or because they cannot be reached in a timely manner. Depending on the importance of the procurement, agencies may want to consider using the following statement in the solicitation document in lieu of checking references for all respondents.

[Agency name] reserves the right to check references prior to award. Any negative responses received may be grounds for disqualification of the proposal.

By using this clause, agencies are not required to check references but may choose to do so. Whether or not to check references as part of the evaluation criteria is at the discretion of the agency based on the individual procurement.

Oral Presentations/Discussions

Oral presentations or discussions are conducted at the option of the agency. If conducted, the solicitation document must state when oral presentations or discussions will occur. Oral presentations and discussions provide an opportunity for respondents to highlight the strengths and unique aspects of their proposal and to provide answers to questions the agency may have regarding the proposal. Demonstrations of product functionality are recommended when appropriate, such as information technology procurements or solution based procurements.

Oral presentations and demonstrations can be scheduled for all respondents or limited to the top ranked vendors in the competitive range. An example of how to determine competitive range is demonstrated below:

Determining the Competitive Range

Evaluation Scores - Scenario 1	Evaluation Scores - Scenario 2	Evaluation Scores - Scenario 3
97	97	97
93	93	96
90	82	90
89	81	89
88	79	88
65	68	85

In the first scenario, the top five (5) respondents are in the competitive range. In scenario number 2, the competitive range could include the top two (2) respondents or the top five (5) respondents. In scenario number 3, there is a 6 point difference between the 2nd and 3rd score, with the remaining scores close behind. Therefore, the best option is to include all six (6) respondents. Agencies should look for a “natural break” in the scores that will determine the competitive range. The competitive range should consist of those proposals determined to be reasonably considered for award selection.

Oral presentations and demonstrations should be fair to all parties. The time allowed and the format should be the same for all presenters. A prepared script will ensure consistency. Since some presenters believe there is an advantage to the order in which they present, it is best to draw names for the presentation order. This will ensure impartiality of the process.

After the oral presentations or demonstrations are completed, respondents must be given equal opportunity to discuss and submit revisions to proposals (unless applicable statute requires negotiation be conducted one at a time). Normally this is accomplished by formally requesting Best and Final Offers (BAFOs) at the conclusion of discussions with a deadline set for receipt of BAFOs. Commonly, BAFOs are submitted by supplemental pages and not a complete resubmission of the proposal.

Negotiations

State agencies may negotiate terms and conditions in some solicitations and not in others. For example, the competitive sealed bid method does not allow negotiations, while the competitive sealed proposal method does allow negotiations. Unless specifically authorized by statute, state agencies may not negotiate the price, specifications, terms or conditions when using a competitive bid process. A competitive bid presupposes that a good or service is:

1. Objectively describable in that respondents are bidding on the same product or service and terms and conditions;
2. Available from more than one seller.

A bidding process cannot be competitive unless each respondent is bidding on like items. If the negotiation changes or modifies the specification or any other term or condition, each respondent is not afforded the same opportunity to bid upon the like items. A request for a respondent to clarify an offer is not the same as negotiation of the specifications or terms and conditions so long as the request to clarify does not afford one respondent an advantage over another.

Technical leveling and technical transfusion are prohibited discussion techniques. Technical leveling is helping a respondent to bring their proposal up to the level of other proposals through successive rounds of discussion, usually by pointing out proposal weaknesses. Technical transfusion is the disclosing of technical information or approaches from proposals to other competitors in the course of discussion.

Agencies may not disclose information derived from proposals submitted from competing respondents in conducting discussions. Prohibited disclosures include:

- 1) disclosing competing respondents' cost/prices (even if the disclosure is made without identifying the vendor by name); and
- 2) advising a respondent of its price standing relative to other respondents.

Competitive proposal and qualification processes generally contemplate and allow a certain amount of negotiation. The best practice is to read the requirements of the applicable procurement procedure to verify that negotiation is permissible. Even in competitive proposal or qualification processes, care should be taken to avoid inadvertently changing the stated contracting objectives. If the contracting objectives are changed through the negotiation process, each potential contractor is not placed on an equal level to propose an offer.

Similarly, care should be taken when determining negotiation strategy whether to include, as a part of that strategy, giving the vendors a cost or price that must be met to obtain further consideration. Suggesting a cost or price could deprive the competitive process from generating the cost or price that is the best value to the state. Also, be mindful that the above prohibitions still apply, i.e., disclosing competing respondents' costs or prices is not allowed, even if done without tying the cost or price to the specific vendor; and respondent cannot be told its price standing relative to other respondents. Negotiation strategy should be tailored to suit the particular facts and circumstances of the specific competition.

Negotiation Strategies

Negotiation is based on the willingness of each party to compromise. In any agreement, there are usually terms or conditions that each party may be willing to relinquish. Agencies must identify those terms or conditions that are essential, desirable, subject to negotiation or relinquishment.

Like other parts of the contract management process, planning is essential to conducting a successful negotiation. Planning allows the agency to know which terms and conditions are essential and which are negotiable. The best practice is to meet with members of the contracting team and divide the terms and conditions into groups. Identify the terms and conditions that are essential to the agreement. These are the terms or conditions upon which the agency is either unable or unwilling to compromise. Then identify and prioritize the terms and conditions that are desirable, but not essential to the agreement and which the agency is willing to compromise or relinquish.

Negotiation Techniques

There is not a single approach to negotiation and the following discussion is just one method to facilitate a successful negotiation effort.

Designate a lead negotiator to establish an organized and controlled negotiating environment that ensures the contract management team's effort is efficient, coordinated and unified. The lead negotiator should control the meeting and ensure everyone is hearing and discussing the same issue. Side discussions are distracting and may inadvertently provide information to the contractor to the disadvantage of the entire contract management team. If available, provide a private side room for the negotiation team to use for private conversations or to "caucus" during negotiations.

Do not provide the list of essential or other prioritized issues to the contractor because the list will offer a negotiating advantage to the contractor. On the other hand, before meeting with the contractor, request a list of the contractor's objections to any contract terms and conditions that explains why the contractor is objecting to each term or condition.

Be prepared to explain why a particular term or condition is essential or objectionable and place the burden on the contractor to identify an alternative solution that meets agency needs. Do not feel pressured to agree or disagree to a single term or condition without considering the impact of the entire group of negotiated terms and conditions within the context of a final agreement. When the entire group of negotiated terms and conditions is completed, consider any new risks, costs or benefits. Take frequent breaks to discuss suggestions, options or alternatives outside of the presence of the contractor. Write down or use a laptop to record the exact language of any proposed or alternative terms and conditions, so that the team evaluates the exact language that will be included in the contract.

Negotiations can reach an impasse over conflicting terms thought to be essential to each party. The three (3) question approach used to assist an agency in identifying the contracting objectives may be useful to assist the parties in clarifying and harmonizing potentially divergent objectives and interests. The three (3) questions are:

1. What does your agency want, *specifically*?
2. What will having what your agency wants, *specifically*, do for your agency?
3. How will your agency know, *specifically*, when your agency has received what it wants?

The second question, “What will have what your agency wants, *specifically*, do for your agency?” may provide common ground to explore options to meet the needs of both parties. If an agreement is not reached consider beginning negotiations with the next contractor or re-soliciting the opportunity.

Usually a contractor will have a better understanding of the needs, objectives, assumptions and constraints facing an agency after detailed discussions have concluded. Consider allowing each contractor to propose a “best and final offer” before a final selection is made.

Contract Formation

The information in this chapter is not intended to provide legal advice to agencies. This chapter includes general rules regarding contract formation. However, there are also many variations and exceptions to these general rules, so consult your agency legal office for the applicable rules of law for each procurement.

Texas courts define a contract as a promise or a set of promises to which the law attaches legal obligation.^{xxiv} The law regards the performance of these promises as a duty and provides a remedy for the breach of this duty.^{xxv} Contracts that deviate substantially from requirements defined in the solicitation document are open to challenge from unsuccessful respondents.

Authority to Contract

Only persons having actual authority to act on behalf of the State can bind the State in a contract.^{xxvi} The powers of all state officers are set by law. All persons dealing with state officers must know the limits of their authority and determine if the contemplated contract is within their statutory authority. One should not indulge in presumptions or rely on the implied authority of an officer or agency of the state to contract.^{xxvii} Therefore, a threshold issue in government contracting is whether a state agency has statutory authority to contract.

The legislature established through the Government Code a comprehensive regime for state purchasing, which requires state agencies to make purchases through CPA unless an exception applies.^{xxviii}

This broad grant of purchasing authority to CPA has limitations. For example, the definition of ‘services’ applicable to CPA’s authority includes skilled or unskilled labor or professional work, but does not include a: professional service subject to Texas, Government Code, Subchapter A, Chapter 2254; services of a state agency employee; consulting services or services of a consultant as defined by Texas, Government Code, Subchapter B, Chapter 2254; or the services of a public utility.

Specific statutory exemptions from CPA authority may also remove a particular purchase, purchase method or contract from the purview of CPA. For example, a contract by the State Council on Competitive Government or a decision regarding whether a state agency is required to engage in competitive bidding is exempt from another state law regulating or limiting state purchasing or a purchasing decision.^{xxix} Additional examples of statutory exceptions and/or exemptions from CPA authority include but are not limited to:

- Group Purchasing Programs^{xxx}
- Purchases from Higher Education Research Funds^{xxxi}
- Purchases of Certain Medical Equipment by Medical or Dental Unit^{xxxii}

- Exemption of Goods or Services of Blind or Visually Impaired Persons^{xxxiii}
- Exemption for Certain Libraries and Health Facilities^{xxxiv}
- Purchase From Gift or Grant Not Within Commission's Purchasing Authority^{xxxv}
- Certain Other Purchases Not Within Commission's Purchasing Authority^{xxxvi}
- Purchases by Veteran's Land Board^{xxxvii}
- Purchase of Care and Treatment Services by Texas Youth Commission^{xxxviii}
- Procurements by Health and Human Services Agencies (does not include common goods and services)^{xxxix}
- Health Care Purchasing^{xl}
- Certain Purchases by Employees Retirement System of Texas^{xli}
- Mental Health and Mental Retardation Community Centers; Assistance Organizations^{xlii}
- Purchases by Legislature and Legislative Agencies^{xliii}
- Local Government Purchasing Program^{xliv}

Even if a statute creates an exception to CPA's authority to make purchases, the authority to purchase goods or services must be found in another statute before an agency is authorized to purchase.^{xlv} One of the statutory sources for a state agency's contracting authority is a statutory delegation.

Binding Signatures

Original signatures by those in authority to contract are the usually accepted norm through which a contract becomes binding. There may be instances where time considerations dictate the need to accept a faxed signature as evidence a respondent accepts the terms of a contract. Additionally, it is possible that an email or a chain of emails that make it clear a party accepts the terms of a contract can be enforceable. Faxed signatures or emails should always be followed up with original signatures.

Delegated Purchases

By statute, agencies are authorized to purchase goods and services if the cost does not exceed \$15,000. Additionally, CPA is authorized to delegate additional purchasing authority. The delegated authority of a state agency to bind the State in contract is primarily defined by dollar amount and subject matter. See Bidding Requirements and Dollar Limits or Thresholds (<http://www.window.state.tx.us/procurement/pub/manual/2.11.pdf>.)

An agency may not use its delegated purchasing authority to purchase:

1. Items provided by a CPA state contract (unless the quantity to be purchased is less than the minimum quantity specified in the CPA contract);
2. Items that are required by statute to be purchased from a particular source; or
3. Items that constitute 'scheduled items' designated for purchase by the CPA^{xlvi}

Individual state agencies may have statutory purchasing authority that is independent of the authority delegated by CPA; therefore, a thorough examination of each state agency's statutory purchasing authority is necessary to identify an agency's purchasing or contracting authority.

Legal Elements of a Contract

The essential elements necessary to form a binding contract are usually described as:^{xlvi}

- An Offer
- An Acceptance in strict compliance with the terms of the offer
- Legal Purpose/Objective
- Mutuality of Obligation – also known as the “meeting of the minds”
- Consideration
- Competent Parties^{xlvi}

Offer

An offer is defined as the manifestation of the “willingness to enter into a bargain so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it.”^{xlix}

Acceptance

Acceptance of an offer can occur in several ways: Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.^l An acceptance must not change the terms of an offer. If it does, the offer is rejected.^{li} A material change in a proposed contract constitutes a counteroffer, which must be accepted by the other party.^{lii}

Legal Purpose

The objective of the contract must be for a legal purpose. For example, a contract for illegal distribution of drugs is not a binding contract because the purpose for which it exists is not legal.

Mutuality of Obligation

This element is also known as the “meeting of the minds”. Mutuality of obligation refers to the parties' mutual understanding and assent to the expression of their agreement.^{liii} The parties must agree to the same thing, in the same sense, at the same time. The determination of a meeting of their minds, and thus offer and acceptance, is based on the objective standard of what the parties said and did and not their subjective state of mind.^{liv} Unexpressed subjective intent is irrelevant. In determining whether mutual assent is present, the court looks to the communications between the parties and to the acts and circumstances surrounding these communications.^{lv} The offer must be clear and definite just as there must be a clear and definite acceptance of all terms contained in the offer.^{lvi} Where a meeting of the minds is contested, the determination of the existence of a contract is a question of fact.^{lvii} If the fact finder determines that one party reasonably drew the inference of a promise from the other party's conduct, that promise will be given effect in law.^{lviii}

To be enforceable, the parties must have agreed on the essential terms of the contract.^{lix} However, parties may agree upon some contractual terms, understanding them to be an agreement and leave other contract terms to be made later.^{lx} Full agreement on all contractual terms is the best practice and should be the norm. It is only when an essential term is left open for future negotiation that there is nothing more than an unenforceable agreement to agree.^{lxi} Such an agreement is void as a contract.^{lxii}

Any contract or mutual understanding between parties that differs materially from the original offer is open to legal challenge. Should any component of a negotiation tend toward a final result where a contract or agreement differs materially from the offer, that component of the negotiation should cease. If the component in question is critical to the provision of a service or goods, the issuance of another offer that incorporates that component should be considered.

Certainty of Subject Matter

In general, a contract is legally binding only if its terms are sufficiently defined to enable a court to understand the parties' obligations.^{lxiii} The rules regarding indefiniteness of material terms of a contract are based on the concept that a party cannot accept an offer so as to form a contract unless the terms of that contract are reasonably certain.^{lxiv} Thus, the material terms of a contract must be agreed upon before a court can enforce the contract.^{lxv} Each contract should be considered separately to determine its material terms.

As a general rule, an agreement simply to enter into negotiations for a contract later also does not create an enforceable contract. Parties may agree on some of the terms of a contract and understand them to be an agreement, and yet leave other portions of the agreement to be made later.^{lxvi}

Sometimes terms are omitted from contracts and assuming the omitted term is not an essential term, the courts have implied terms to preserve the enforceability of the contract should a legal challenge arise. A court may uphold an agreement by supplying missing terms.^{lxvii} Historically, Texas courts prefer to validate transactions rather than void them, but courts may not create a contract where none exists and they generally may not insert or eliminate essential terms. Whether or not a court will imply or supply missing contract terms will depend on the specific facts of the transaction. An example of terms that have been implied or supplied are time and place of performance.^{lxviii}

Consideration

Consideration is an essential element of any valid contract.^{lxix} Consideration consists of either a benefit to the promisor or a detriment to the promisee.^{lxx} It is a present exchange bargained for in return for a promise. It may consist of some right, interest, profit, or benefit that accrues to one party, or alternatively, of some forbearance, loss or responsibility that is undertaken or incurred by the other party.^{lxxi} It is not necessary for a contract to be supported by a monetary consideration.^{lxxii}

Competent Parties

Parties to a contract must be competent and authorized to enter into a contract.

Approach to Contract Formation

Fundamentally, the purpose of any written contract is as a reference document that records the terms of an agreement to prevent misunderstanding and conflict as to those terms at a later date, and creates a legal, binding and enforceable obligation. Most often, conflicts over contracts arise well into a contract period – when memories prove to be unreliable. With this in mind, clarity of the terms and completeness of the issues addressed are of primary importance. The person who drafts the contract must know the subject matter and concerns of the parties thoroughly enough to anticipate potential areas of disagreement and specifically address them in the contract.

Thoroughness and precision are necessary in determining the scope of a project because contract law does not allow parties to add terms not part of the original contract without the consent of both parties. This rigidity in contract law is mostly seen as an advantage to both parties. However, this advantage may become a liability if the agency does not include all necessary language.

Creating contracts for the state is an exercise in balancing conflicting interests. These interests include the state's requirements, fiscal constraints, statutory requirements and the contractor's requirements. The primary concern should always be the benefit of the contract to the state as a whole, or more specifically, the taxpayers of the state.

The best contract for the state does not necessarily mean squeezing every advantage out of the contractor. While onerous and unnecessarily harsh provisions may be legal, they usually have negative future consequences that outweigh the initial gains. Contractors who feel they have been aggrieved by the state are less likely to provide good service and are more apt to engage in legal action. Or these contractors may decide to never contract with the state again thus limiting future competition on state contracts. In addition, contractors who are informed by other contractors of bad experiences with the state may demand more money on future contracts to do the same work to offset the perceived risk.

Drafting the Contract

Contracts usually include a variety of terms and conditions often referred to as 'boilerplate' or 'standard' terms and conditions. While many contracts produced by agencies include similar terms and conditions, historically there have been no generally accepted terms and conditions for use by all state agencies. This chapter of the Guide provides generally accepted terms and conditions for use by all state agencies. Agencies should keep in mind that these are recommended terms and conditions and unless otherwise specified, may be modified to meet the agency's need.

A particular business entity or agency that repetitively contracts for the same or similar goods or services may develop a contract with terms that are standard for a specific transaction. These standard terms are usually the product of years of experience and are typically designed to favor the party drafting the contract.

Except for contract terms that are contrary to public policy that may be void, voidable or severable from a contract, the types of contract terms that may be included in a contract are only limited by the creativity of the drafter. The appropriate terms to include in a contract are the terms that fully describe the actual agreement of the parties. There are types of provisions that are typically included in contracts, including but not limited to:

1. Administrative provisions;
2. Financial provisions;
3. Provisions that allocate risk;
4. The statement of work;
5. Provisions relating to the contract term, termination and dispute resolution; and
6. Provisions that relate to rights and ownership of work product and intellectual property.

Planning for the Contract

Just like other contract management processes, an agency should plan for drafting the contract. A common practice is to include a draft of the standard agency contract in the solicitation document. This allows a potential contractor to make an offer with knowledge of the proposed contractual terms and conditions. As a practical matter, during the RFP process, it may be difficult to prepare a draft contract with a detailed statement of work due to the potential for negotiation. Be sure to plan for adequate time to prepare the final contract.

The planning effort could begin by collecting and reviewing similar contracts used by other agencies. Do not automatically adopt terms and conditions from another contract without a thorough and independent review of how the terms and condition relate to the current procurement. Studying risks, contracting objectives, assumptions and constraints in other contracts may be helpful. Another method to plan for a contract is to prepare an outline containing headings for the major terms, conditions and provisions. This makes it easier to group related terms and conditions. An outline will also illustrate gaps in the structure of the contract. Finally, allow adequate time for an attorney to address potential legal issues.

Form of the Contract

Evidence of an agreement or a contract can be documented in different formats, including but not limited to a “four-corner contract”, a purchase order, or an exchange of correspondence. The term “four-corner” contract is used to describe a single document that includes all of the terms and conditions within the four-corners of a single document. Purchase orders can also be considered a contract. The contractor delivers an offer, in a form requested by the agency, and the agency indicates acceptance of the offer by issuing a purchase order. The documents that comprise the offer and acceptance are the evidence of the agreement.

Each of the forms of contracts described herein has advantages and disadvantages. The determination of which format is appropriate should be based on an assessment of the risks involving contract construction or interpretation.

A ‘four-corner’ contract offers the greatest opportunity to avoid conflicting provisions, because all of the provisions are contained in one document. Contract management is sometimes easier when all of the provisions regarding the duties, obligations and responsibilities of each party can be logically organized and easily found. On the other hand, ‘four-corner’ contracts require more time to plan and prepare. Notwithstanding the additional time requirement in a major or complex transaction, a ‘four-corner’ contract is the best format to clearly document an agreement.

A purchase order uses a layered approach, i.e., the purchase order usually relies on a number of documents that in combination, comprise the contract. An agency may publish a solicitation document that includes product specifications, contractor qualifications and other terms and conditions. The contractor’s response may condition the offer on terms and conditions that are different from or in conflict with the solicitation document. When the agency uses a purchase order, the contractor’s terms and conditions should not become the basis of the agreement.^{lxxiii} Despite the potential for conflicting or additional terms, when used properly, a purchase order is quick, efficient and rarely has problems. When using a purchase order as evidence of a contract, an agency should insure the inclusion of terms the agency wants rather than blindly accepting terms the contractor proposes. All final terms and conditions that vary from either the offer or the acceptance must be contained in a written document signed by both parties.

Contract Terms

During the development of the formal contract, devote careful attention to the details. There are certain clauses that are essential and some that should be included in all contracts. See Appendix 9 for examples of contract terms. Please consult with your agency’s legal counsel regarding any questions related to the applicability of contract terms because some agencies have additional statutory requirements regarding contracting.

Essential Clauses and provisions that should be included:

- | | |
|------------------------------|---|
| ➤ Introduction | ➤ Dispute Resolution |
| ➤ Scope of Work | ➤ Contractor Responsibilities |
| ➤ Term of Contract | ➤ Indemnification/Damage Claims |
| ➤ Consideration/Price | ➤ Abandonment or Default |
| ➤ Specifications | ➤ Right to Audit |
| ➤ Funding Out Clause | ➤ Force Majeure |
| ➤ Antitrust | ➤ Ownership/Intellectual Property, including Rights to Data, Documents and Computer Software |

- **Payment**
- **Independent Contractor**
- **Affirmation Clauses**
- **Termination**
- **Technology Access Clause**
- **Buy Texas**

Other clauses are recommended for contract inclusion depending on contract specifics.

Recommended Clauses include:

- **Notice**
- **Order Precedence**
- **Patents and Copyrights**
- **Assignment**
- **Insurance**
- **Propriety Information**
- **Confidential Information (Essential for Client Services Contracts)**
- **Substitutions**
- **Taxes**
- **Public Disclosure**
- **Security/Parking Access**
- **Smoking Policy**
- **Drug Free Workplace Policy**

Federally Funded Contracts

Federal grants have specific contract requirements which are outlined in the *Uniform Requirements for Grants and Cooperative Agreements to State and Local Governments*, (OMB Circular 102). Agencies are encouraged to ask federal agencies administering the particular grant programs to identify essential and mandatory clauses used in the State's sub-recipient agreements. Also see the Uniform Grant Management Standards published by the Governor's Office.

<http://www.governor.state.tx.us/divisions/stategrants/guidelines/view>

State Contracting Standards/Oversight

Texas Government Code, Chapter 2261, titled *State Contracting Standards and Oversight*, offers state agencies guidance in four areas related to contracting: contractor selection, contract provisions, payment and reimbursement methods, and contractor oversight.

Applicability

This statute is **not** applicable to:

Type of Contract/Purchase Method	Texas Government Code
Purchases made by CPA.	2261.001(a)
Authority delegated to agencies by CPA.	2261.001(a)
Purchases made pursuant to the Education Code §51.9335 or §73.115.	2261.001(a)
Purchases made pursuant to Government Code §2155.131, 2155.132, or 2155.133.	2261.001(a)
Purchases or contracts by the Texas Department of Transportation.	2261.001(d)
Consulting or Professional Service contracts pursuant to Government Code 2254.	2261.001(e)
Grants to School Districts.	2261.002(a)
Grants for 'other' academic purposes.	2261.002(a)
Open Market purchases if agency is authorized to make open market purchases.	2261.003
Procurement paid for by local or institutional funds of an institution of higher education.	2261.001(d)

Contract Administration

Contract administration and oversight includes four (4) general processes:

1. Planning
2. Monitoring Contractor Performance
3. Payment Approval
4. Change Management

The primary objectives of contract administration are to:

- Verify contractor performance for purposes of payment.
- Identify material breach of contract by assessing the difference between contract performance and material non-performance.
- Determine if corrective action is necessary and take such action if required.

The statement of work should be the roadmap for contract administration. Therefore, planning for contract administration occurs prior to issuance of the solicitation. The goal of contract administration is to ensure the contract is satisfactorily performed and the responsibilities of both parties are properly discharged. Effective contract administration minimizes or eliminates problems and potential claims and disputes.

A good contract manager ensures that the contract requirements are satisfied, that the goods and services are delivered in a timely manner, and that the financial interests of the agency are protected.

It is the contractor's responsibility to perform and meet the requirements of the contract. To do so, contractors sometimes need technical direction and approval from agency personnel. Agency personnel must provide this technical direction and approval in a timely and effective manner. All guidance provided to a contractor must be within the scope of the contract.

Agencies must be careful to not impose additional requirements upon the contractor or manage the contractor's operations to the extent that the contractor is relieved of their responsibility to perform.

The extent of contract administration will not be the same for all contracts. The level of contract administration necessary should be consistent with the complexity and level of risk of the contract, its' term, and dollar value.

Contract Manager Responsibilities

The primary responsibilities of the contract manager are:

- Participating, as necessary, in developing the solicitation and writing the draft documents. Contract administration must be considered during this process.
- Monitoring the contractor's progress and performance to ensure goods and services conform to the contract requirements.
- Managing any state property used in contract performance.
- Authorizing payments consistent with the contract terms.
- Exercising state remedies, as appropriate, where a contractor's performance is deficient.
- Resolving disputes in a timely manner.
- Documenting significant events.
- Maintaining appropriate records.

The number of participants in the contract administration process will vary in number from one to many depending on the size, level of risk and complexity of the contract. Early in the procurement process, identify staff to participate in contract management. Identify a single contract manager and others to assist the contract manager. Assign roles and responsibilities which may include:

- Determining the sequence of activities, dependencies, required or desired outcomes, and acceptable performance levels.
- Developing a timetable and start and end date for each performance component. Include milestones with accompanying timeframes, and monitoring and reporting requirements.
- Monitoring contractor activity on a specified frequency to identify problem areas.
- Meeting with the contractor on a regular basis to review progress, discuss problems and consider necessary changes.
- Providing access to state facilities, equipment, data, staff, materials and information.
- Contacting other staff as necessary to provide equipment and data.
- Establishing scope of authority, clear lines of communication and reporting and specific individuals who will interact directly with the contractor.
- Establishing control of correspondence, data and reports.
- Identifying potential problems and solutions.
- Defining terms or conditions of default.
- Establishing a procedure, identifying a responsible person and establishing a timeframe for handling non-compliance.

- Establishing a procedure, identifying a responsible person and establishing a timeline for making necessary contract decisions or modifications.

Planning

As stated earlier, planning for the administration of a contract should begin with the drafting of the statement of work. Procedures for contract administration should be described in the solicitation document. After the contract is executed, the planning activities should focus on general administrative activities including, but not limited to management of contract amendments through documentation of any changes to the contract scope, schedule and payment. Another central activity to contract administration is the advance coordination and scheduling of resources to assist in the performance of the contract administration processes.

In order to properly plan for contract administration, the contract manager must ensure that he/she thoroughly understands all of the components of the solicitation and contract. Examples of such contract components include:

- Expected outcome measures – includes staging of deliverables, if applicable. Significant deliverables should be tied to the payment schedule.
- Costs – The total cost, including any indirect cost allocation of the goods and services to be performed.
- Contract Performance - When, where, and how the goods and services are to be delivered.
- Acceptance/Rejection Terms – The agency's right to inspect and accept or reject the goods and services and the conditions of acceptance or rejection.
- Contract Dates: The effective date, completion date, renewal terms, and any additional dates necessary to monitor contract performance.
- Complete addresses – Where correspondence is to be sent, where payments are to made, etc.

Post Award Conference

A post award conference is a meeting with the contractor and includes the principals responsible for administering the contract. The conference is typically held soon after the contract is awarded. It is an orientation for the contractor to ensure a clear and mutual understanding of all contract terms and conditions, and the respective responsibilities of all parties. The conference also serves as an excellent tool to clarify and resolve any potential misunderstandings early on. Although both the contractor and the agency personnel should be fully aware of the contract requirements, the post award conference ensures that those involved directly in the contract administration process understand all requirements of contract performance.

- Not every contract requires a formal post award conference, but generally there should be some form of discussion between the contracting parties after award to ensure that all parties agree on the performance requirements and the administrative procedures applicable under the terms of the contract. The post award conference should NOT be used to change the terms of the contract.
- Agency personnel should decide if a post award conference is necessary. For less complex, low risk, low-dollar value contracts, a telephone call to the contractor may be sufficient. During the telephone conversation, the agency should review the major points of the contract with the contractor (e.g.; amount of contract, major performance milestones, deliverables, reports, meetings) and time and place of delivery. Factors used to determine the need for a post award conference include:
 - Type of contract;
 - Level of risk associated with the contract;

- Contract value and complexity;
- Length of contract, period of performance and/or delivery requirements;
- Procurement history of the supplies or services required and expertise of the contractor;
- Urgency of delivery schedule;
- Agency's prior experience with the contractor;
- Any special or unusual contract requirements; and
- Any special or unusual payment requirements.

Post Award Conference Agenda

It should be made clear at the beginning of the conference that the purpose of the meeting is to explain or clarify contract requirements and not to make changes to the contract or re-negotiate the contract terms. The post award conference agenda should cover the following:

1. Introduction. Introduce all participants and identify agency and contractor key personnel.
2. Scope. Discuss the scope of the contract (i.e., what the agency is buying). Although this may seem overly simplistic, a total and complete meeting of the minds on this point will avoid problems during the life of the contract.
3. Terms. Summarize contract terms and conditions, particularly any special contract provisions. This can avoid any misunderstandings later on, and allows the contractor to gain a better understanding of the terms prior to beginning work.
4. Requirements. Discuss the technical and reporting requirements of the contract. The technical requirements may be discussed as part of the Scope, above. It is vital that the contractor and the agency have a meeting of the minds regarding technical requirements. The contractor must understand the importance of any reports required under the contract and the importance of submitting them in accordance with contract requirements.
5. Administration. Applicable contract administration procedures, including contract monitoring and progress measurement should be discussed.
6. Rights. The rights and obligations of both parties and the contractor performance evaluation procedures should be summarized. The agency should explain that contractor will be evaluated on their performance both during and at the conclusion of the contract and that such information may be considered in the selection of future contracts.
7. Potential Problems. Potential contract problem areas and possible solutions should be addressed. Any issues or contract areas that the agency believes may lead to a problem later on, or may be subject to differing interpretations, should be discussed.
8. Payment. Invoicing requirements and payment procedures should be discussed, especially if the payment will be made according to milestones achieved by the contractor.
9. Authority. Agency personnel should explain the limits of their authority and obtain the same information regarding contractor personnel.

After the conference, the agency should prepare a summary of the meeting for the contract file which details the topics covered. The summary should include areas requiring resolution, a list of participants, and in particular, those

individuals assigned responsibilities for further action and the due dates for those actions. Copies of the meeting summary should be distributed to all conference participants.

Monitoring Performance

Monitoring the performance of the contractor is a key function of proper contract administration. The purpose is to ensure that the contractor is performing all duties in accordance with the contract and for the agency to be aware of and address any developing problems or issues.

Small dollar value or less complex contracts normally require little, if any, monitoring. However, that does not preclude the possibility of more detailed monitoring if deemed necessary by the agency. Conversely, large dollar contracts may need little monitoring if the items or services purchased are not complex, and the agency is comfortable with the contractor's performance and the level of risk associated with the contract.

Several areas of contract monitoring are discussed in this chapter including:

1. Determining what to monitor and the type of monitoring.
2. How to establish expectations so that individuals responsible for contract monitoring and contractors understand what will be monitored and the criteria used to evaluate contractor performance.
3. How to use risk assessment to select which contractors should be reviewed, the level of review for each contractor, and the subject matter to include in the review.
4. How to use the results of monitoring reviews.

1. Determining what to monitor. Consider the following questions when determining what to monitor:

- How will you know that the agency is receiving what it paid for?
- How will you know that the contractor is complying with the terms of the contract?

Review the statement of work and other contract terms, including contractor compliance requirements. All of these requirements are deliverables that the contractor agreed to when the contract was executed or the purchase order was issued. Design the monitoring program to focus on items that are most important. Generally, this means to focus the monitoring on the outcomes that result from the contract. For example, consider if the agency would be concerned regarding the following issues:

- Eligible taxpayers do not receive the services they should;
- Taxpayers receive less service for which they are eligible;
- Taxpayers receive the wrong services;
- Service priorities for eligible taxpayers are inappropriate;
- Services cost more than they should;
- Money is spent on non-allowable costs (i.e. gifts, etc.);
- The contractor wastes money or does not protect the assets purchased with tax dollars or;
- The contractor inaccurately reports their progress.

Consider the effect that the contract payment methodology has on what needs to be monitored. For example, if payment is based on a firm fixed price (a specific amount of money for a unit of service), it is not necessary to verify contractor's expenses as they are not relevant to this type of contract. Consider buying a box of pencils. The agency knows what they are buying and the cost per pencil. It is irrelevant what the contractor pays for travel or advertising as the agency pays a firm fixed price for the pencils regardless of the contractor's expenses. Under a firm, fixed price contract, the agency should ensure that:

- The number of units billed is the same as the number of units received.
- The quantity and price agree with the contract amounts.
- The units meet or exceed the contract specifications.

If an agency receives grant money to pay for a contract, the agency must consider the nature of the relationship with the contractor. Is the relationship a vendor relationship or a sub-recipient relationship? See OMB Circular A-133, Section 210 (<http://www.whitehouse.gov/omb/circulars/a133/a133.html>) for guidance on relationship determination. If the relationship is that of a sub-recipient, then federal guidelines and cost principles must be followed. The Uniform Grant Management Standards published by the Governor's Office (<http://www.governor.state.tx.us/divisions/stategrants/guidelines/view>) will provide guidance as well.

If the contract is a cost reimbursement contract wherein the agency pays for the contractor's cost plus a percentage of overhead and profit, the agency needs to consider the following monitoring reviews:

- Was the item billed really purchased by the contractor?
- Was the item billed used for the purpose of the contract?
- Was the item necessary and reasonable for the purpose of the contract?
- Was the item of the quality and quantity specified in the contract?
- Was the item duplicated in either overhead or profit?
- Was the item listed in the contractor's budget and approved by the agency? The agency must review the contract to see how the costs are reimbursed. Many contracts require that all costs must be included in the original budget provided by the contractor and approved by the agency. In some cases, the contract may specify that certain costs such as the purchase of a vehicle or use of a subcontractor require approval by the agency prior to purchase.

Monitoring Types

There are different types of monitoring available, including but not limited to:

- **Site Visit (full and limited scope).** Full scope site visits are typically scheduled visits to the contractor's place of business. They are based on risk assessment and cover a broad range of contract compliance and performance issues. Limited scope site visits typically focus on a particular problem. Examples of some typical reasons for considering a limited scope site visit include, but are not limited to:
 - Contractor is responsible for administering funds from two sources and one source has noted serious problems with the way the contractor used the funds.

- Other contractors have experienced problems in a specific area and there is an indication that this contractor might be experiencing the same problem.
 - Inconsistencies in the expenditure draw requests are identified and clarification from source documents is necessary.
 - Contractor has provided a corrective action plan for a problem, but the agency is not certain that the proposed solution will resolve the problem.
- **Desk Review.** Typically these are agency reviews of reports submitted by the contractor to the agency. Agencies should review the reports for the following:
 - Compare the actual performance against the contract requirements. Is the contractor performing in accordance with the contract requirements?
 - Compare actual expenditures to the approved budget. Is the contractor following their approved budget plan?
 - Compare the current period to prior periods. Are there any unexplained trends? Is the contractor performing work significantly different from the last period or the last year?
 - Compare what the current contractor is doing in comparison with other contractors performing similar work.
 - Compare the relationships between key components of the report such as:
 - The cost per unit of service or the percentage of the fees charged to the program;
 - The change in variable costs compared to the units of service provided; and
 - Reported salaries match staffing plan.
 - Compare the report with what is known about the contractor's operating environment. Did a weather emergency in the area recently increase the cost of construction supplies or is the cause of a temporary reduction in services provided?
 - **Expenditure Document Review.** These are reviews of contractor invoices and expenditure draw requests to determine if the rates and services are the same as allowed by the contract. Determine if the supporting documents such as cost reports, third party receipts for expenses, detailed client information, etc. adequately support the request for payment. If the contractor consistently provides incorrect invoices and/or the supporting document is insufficient to support the request, then additional monitoring such as an on-site visit may be necessary.

2. Establish Expectations. The following section explains how to establish expectations so that individuals responsible for contract monitoring and the contractors all understand what will be monitored and the criteria used to evaluate contractor performance.

Site Visits

More complex contracts and contracts that the agency perceives as having a higher degree of risk may require both reviews and visits to the contractor's facilities to ensure progress is in accordance with the contract schedule. Site visits can be used to verify actual performance against scheduled or reported performance. They can also ensure that the contractor is dedicating sufficient resources and appropriate personnel to the contract. Site visits also reinforce the

importance of the contract to the contractor, as well as provide the opportunity to enhance communications with the contractor.

To perform a site visit, the agency should:

A. Develop a comprehensive and objective monitoring checklist which:

- Focuses on the outcomes, but also includes compliance requirements. Monitoring criteria should reference the applicable contract requirement.
- Assess contractor performance the same way. Are any errors considered minor or inconsequential? If so, these must be outlined up front so that the contract is monitored consistently. Clarify areas where monitors may exercise judgment.
- Specify the sample size to be reviewed, but do not disclose specifics to the contractor. For example, an agency may state that they will review case documents for the month of August, but they should not disclose that they will be reviewing case #XXX.

B. Documentation Requirements:

- Allow space on the checklist (or on a separate document) to document the results of the site visit. For example, if the monitor is to review 10 case files, then the documentation must include the identification of the files reviewed, e.g. the case number, the staff members tested for salary allocations, the expenditures reviewed.
- Describe the documentation required for a monitor to bypass an area of monitoring, i.e. “No problems identified last year with the compliance requirement - not monitored this year.” This allows agencies more time to monitor higher risk areas.

C. Sampling and Population

- Ensure the population is complete by including all files relevant to the contract. The contractor should never be the one to select the samples for review.
- If the contractor submits the names of the clients as part of the normal expenditure draw, then the sample can be selected from the client list. Ensure that the clients on the list are paid for by the agency.
- If the contractor cannot locate the sample item selected, it may or may not indicate a problem. Before agreeing to substitute an alternate file, consider the circumstances of the “lost” sample item and determine if the explanation is reasonable or if the monitor suspects that the contractor did not want the monitor to see the file.

The State Auditors Office offers a Statistical Toolbox (<http://www.sao.state.tx.us/resources/tools/default.cfm>) which includes helpful tools for statistical sampling.

D. Tailor the monitoring checklist for each contractor. While there will be standard items that the agency will review for all contractors, each contract/contractor should be reviewed for specific monitoring requirements unique to that contract/contractor. In addition, consider the following:

- Review specific contract requirements to determine if they merit monitoring.
- Look for items that fall just below an amount that would require additional approval.

- Consider problems the contractor has had in the past or what is likely to cause problems for this contractor now. Are parts of the contract new to the contractor? For example, the contractor may be providing the same services but to a different population during this contract.
- What types of items do not need to be monitored and why? For example, if the contractor uses an information database which you have tested under previous contracts, then the risk is low in this area and the database may not need to be reviewed.
- Has another agency or another part of the same agency conducted a review? For example, if your agency provides home delivered meals to people with disabilities, and another agency provides the same services, both agencies could coordinate the reviews of shared contractors.

E. **Monitoring Reports.** The report of the site visit should stand by itself and serve as a record of the monitoring work. A copy of the report should be sent to the contractor and any others who may benefit from the report.

Even if the contractor corrects a problem in front of the monitor, the monitor is obligated to include the problem in the report. This will serve as an indicator to follow up on the problem on future visits to ensure it was corrected.

Include what you have learned during this site visit in the next risk assessment and in future contract requirements. If the monitor recommends changes for the next contract, include the recommendations in the monitoring reports. Also include any contractor recommendations for the next contract.

3. Risk Assessment. Limited resources require the use of risk assessment because there is not sufficient time to oversee all aspects of a contract. An effective risk assessment model will help focus monitoring resources on contractors with the highest risk of noncompliance. First, identify risk factors. Risk factors are indicators that assess the risk of the contract or project objectives not being achieved. General risk factors may include, but are not limited to:

- The contractor's past performance (and past performance of similar contractors);
- The dollar amount of the contract;
- Factors from desk reviews, such as the variance between expected and actual performance;
- Significant problems with payment requests;
- Results of previous monitoring visits;
- Results of monitoring visits completed by other agencies or divisions within the same agency that contract with the same contractor;
- The length of time since the last monitoring visit; and
- How experienced the contractor is with the type of work to be performed.

Once the risk factors are identified, assign weights to each factor. Weights describe how significant each factor is in identifying the contractors who should be monitored. However, weights can also be designed to ensure statutory or policy requirements. For example, if the statute requires a site visit every three years, the assigned weight would be indicative of the period since the last site visit.

Next, rate each contractor on the risk elements. Consider using a three point scale, where 3 is high risk, 2 is medium risk and 1 is low risk.

Below is a sample risk assessment. The assumptions for this sample risk assessment include:

- The agency has contracts with many vendors for providing the same service. Only three contractors are rated in this example but there are many contractors involved.
- The three risk elements used are dollars, past performance, and experience.
 - Dollars: 40% of the contractors receive less than \$100,000 from the agency per year. 50% receive between \$100,000 and \$250,000. 10% receive more than \$250,000.
 - Experience:
 - High Risk – the vendor has never done this type of work before.
 - Medium Risk – the vendor has contracted with the state before but not for this type of work.
 - Low Risk – the vendor has previously contracted with the state for the same type of work.
 - Past Performance: If the contractor has at least one significant finding from a prior monitoring or three less significant findings the contractor is considered high risk. Agencies should define their own past performance risk factors and weights.

EXAMPLE - RISK ASSESSMENT ANALYSIS

Contractor	Dollars			Experience			Past Performance			Total Risk
	Amount	Risk	Risk x Weight (0.2)	Results	Risk	Risk x Weight (0.5)	Results	Risk	Risk x Weight (0.3)	
#1	\$300K	3	.6	Held previous contract with state	1	.5	3 minor findings	2	.6	.6 + .5 + .6 = 1.7
#2	\$75K	1	.2	New to type of work	3	1.5	New – no findings	1	.3	.2 + 1.5 + .3 = 2.0
#3	\$125K	2	.4	Used before – but not for this type of work	2	1.0	Previous year finding regarding safety	3	.9	.4 + 1.0 + .9 = 2.3

In this example Contractor #3 has the highest risk, followed by Contractor #2 and #1, respectively. Typically, there will be many different risk elements. The above is a simple example shown for illustration purposes only.

Accordingly, the contractors with the highest risk level must be monitored more closely. In the above example, Contractor #3 has been used before and there was only one finding in regard to safety. This is the key area that requires close monitoring during the contract. The example can also be used for single contractors to focus on specific areas of risk within a contract and to assist agencies in determining which areas to monitor.

It is important to note that the risk assessment is a dynamic process that should be updated regularly to reflect the results of monitoring visits, reviews of payment vouchers, desk reviews, etc. For example, if a contractor has fallen significantly behind schedule in delivering services to the targeted population, the risk assessment should be updated to indicate the elevated risk and this impacts how the contract is monitored in the future. Likewise, if a contractor is well ahead of schedule in delivering services to the targeted population, the risk assessment should be updated to indicate the lower level of risk.

4. Using monitoring review results. Monitoring reviews, audits, and investigations should be routinely followed up to:

- Ensure corrective actions have been taken;
- Identify common problem areas that might require training; and
- Improve future contracts.

Agencies should design a system that includes criteria and defined follow up actions. The goal of follow up should be to bring the contractor back into compliance with the contract requirements. Follow up is essential as the problem will not correct itself simply by identifying it and including it in the monitoring report.

Monitoring results should also be used to improve the contract requirements for future contracts. If there are unnecessary restrictions or insufficient restrictions, this is the time to make a note of the recommended changes so future contracts can incorporate the changes.

Information on inspection, testing and acceptance of common goods and services (<http://www.window.state.tx.us/procurement/pub/manual/2-42.pdf>) can be found in the CPA Procurement Manual.

Reporting

Reporting includes both a contract administrator reporting to executive management and the contractor reporting to the contract administrator. There are generally two (2) categories of reports: status reports and activity reports. Both types of reporting serve useful functions:

- **Status Reports** – Describe the progress of the work. The content of the status report should be consistent with and track the organizational structure of the statement of work, i.e. phases, segments, deliverables and products. A status report should describe what work is complete and what work is pending and that status should be contrasted against the contract schedule. Only work that has been verified as completed or accepted should be categorized as complete. If there are any unresolved issues that the agency is contractually obligated to resolve, those issues should be included in the status report and a resolution should be requested. If the scope of work has changed during the contract (by written contract amendment), insist that status reports track the original contract schedule, not a revised contract schedule, unless the amendments provides for a revised contract schedule. If status is tracked against a revised schedule, there is a risk that the schedule will continually change and the status report will be rendered meaningless.

If the contract does not provide for periodic status reports, the agency should ensure that sufficient progress is being made by the contractor. This may be accomplished by requesting a status update from the contractor or a site visit to view the progress.

- Activity Reports – Describe any activity on the project; project activity is not the same as a status report. A project may have a great deal of activity without making substantive progress. On the other hand, activity reporting can be a core feature of contract management. For example, a contractor payment in an outsourcing contract may be based on the number of completed transactions. In this example, activity reporting is critical to contract administration.

Monitoring by Third Parties

In some instances the obligation of monitoring the progress of a contract is assigned to another contractor. This is also known as independent oversight. For example, in the case of a construction contract, the task of ensuring progress in accordance with the contract may be performed by the architectural firm that provided the construction plans. For highly technical work, consultant subject matter experts may perform monitoring services independently or in conjunction with agency staff.

Payment Approval

The costs incurred by the contractor should be in accordance with the contract rate schedule. Invoices should be reviewed to ensure that the contractor's billing coincides with the contract's progress. This requires that the contractor's progress be measurable. Cost incurred or invoices submitted, in and of themselves, are insufficient indicators of the contractor's progress.

If the agency believes that the requested payment exceeds the contractor's progress, an explanation should be requested from the contractor prior to approval of the invoice. Payment should be withheld pending agency satisfaction with the contractor's progress.

Invoices must be approved by program staff prior to payment. Payments must be made in accordance with the Texas Prompt Payment law^{txxiv} which requires that correct invoices be paid within 30 days from the date the correct invoice was received or the services/goods received, whichever is later. The invoice should be reviewed to ensure:

- The contractor is billing only for goods or services received by the agency.
- The goods or services have been accepted.
- The invoice is correct and complies with the terms and conditions of the contract.
- The total payments do not exceed the contract limits.

Client services contracts are unique in that acceptance of a good or service is not an indicator that an invoice should be paid. Problems with client services contracts generally surface after invoices are paid. Contract managers dealing with client services contracts should ensure mechanisms exist to penalize contractors for poor performance and that future payments may be withheld until performance improves.

Withholding Payment

Agencies have the responsibility to protect the interests of the agency and under appropriate circumstances, it may be necessary to withhold payments from contractors. Circumstances where it may be necessary to withhold payment include, but are not limited to:

- There is a material breach of the contract by the contractor;
- Errors in the invoice;

- Unsupported or undocumented costs;
- To remedy previous overpayments on the same contract; and
- Contractor's performance is non-conforming or unacceptable.

Change Management

Throughout the term of the contract it may become necessary to make changes to the contract. These changes can be minor, administrative changes such as a change of address or they can be substantial changes that affect the price and delivery. There are basically two ways to change a contract. One is a bilateral amendment, in which all parties to the contract agree that a modification is necessary because the scope of work, the term of the contract, or some other provision of the contract needs to be altered. The second is the right to unilaterally modify the contract. In this case, terms and conditions in the original contract set forth the situations under which the agency may exercise a right to modify the contract without the contractor's consent.

Agencies should have an effective change management process in place. Failure to manage and control changes can result in an unintentional modification to the scope of work, extension of the schedule, increase in the contract cost, circumvention of management controls and diminished contractor accountability. An effective change management process includes but is not limited to:

- Formal, written approval of all changes prior to the change taking place. Do not verbally authorize the vendor to begin working on a change before formal process is fully analyzed, documented and approved in writing.
- Evaluation of the impact of each change to the contracting objective, the corresponding deliverable and/or products, the schedule, cost, and increase in agency overhead resulting from the change, impact to work in progress/completed work, standards, and acceptance criteria.
- If the contract contains a contingency allowance, develop a plan for how draws against this allowance will be requested and approved.
- Documentation of all changes, no matter how small and avoids any informal undocumented change process.
- Establish a single point of contact to recommend or authorize any change. Document the change as approved or disapproved. If a change is approved, document the change and the impact to the scope of work through a contract amendment or purchase order change notice, whichever is applicable.

Contract Changes and Contract Scope

Whether or not a contract may be changed, depends upon certain principles. State law requires a competitive process in most situations. The specific method of competition depends upon the type of goods or services needed. If competed, the resulting contract must be consistent with what was asked for during the competition, usually contained in the solicitation document. Not being consistent can violate the competitive process requirements.

If a change is needed to a contract, the change has to be within the scope, or range, of what was provided in the solicitation. A significant difference would be a material or substantial change in the scope of services, and would not be allowed because it had not been originally subject to fair competition. To permit such a change would go against the ideas of competition and a fair playing field for all of the vendors.

By way of example, if a contract to buy 10 desks is amended to include 300 file cabinets, the change is outside the scope of the contract because vendors did not have the opportunity to compete for the sale of 300 file cabinets. Additional vendors may have competed had they known that file cabinets were being solicited. Such a large quantity of file cabinets could also have had an impact upon which vendors competed. Other vendors may have been interested in bidding on file cabinets that were not interested in bidding on desks.

In order to determine what constitutes scope changes to advertised specifications, the significant question is whether the changes are material or substantial.

Material or substantial changes are not measured by the number of changes made to the original specifications. Rather, they are measured by whether the extent of the changes would so substantially alter the original specifications that not re-advertising the revised specifications would deny a procurement opportunity to someone who would have been able to respond to the revised specifications. If much is revised, then those changes will be treated as a new proposal. A new solicitation is needed to ensure compliance with the bidding statutes.^{lxxv}

Although limited, there are several decisions that explain the principles.

In one situation, a Commissioners Court awarded a construction contract. After awarding the contract, it was decided that a tile floor had to be excluded from the original plans. Since the advertised specifications formed the basis for the contract award, the Attorney General Opinion determined that all bidders would need to be given an opportunity to bid on the new specifications. No material or substantial change in the terms could be allowed without that opportunity.^{lxxvi}

In a different procurement, a City advertised for competitive bids on a treatment plant contract. When each of the five bids submitted exceeded money available for the project, the City made more than thirty-five (35) changes to the original plans. But the City only presented these revisions to the original low bidder, who submitted a revised bid—one much lower than its original one. It was determined in the Attorney General Opinion that these changes were substantial enough that the revised plans constituted new specifications requiring new bids. Just because a company is the lowest bidder on one set of specifications does not mean it will be the lowest bidder when the specifications change.^{lxxvii}

Another example involved a County that received bids exceeding its project funds. Initially only negotiating with the lowest bidder for a proposal to reduce scope, it later apparently realized its error and the proposal was rejected. When the lowest bidder appealed his loss in the trial Court, the appellate Court upheld the trial Court's judgment. It emphasized that the competitive bidding process is designed to stimulate competition, and that compliance with statutory bidding requirements is mandatory.^{lxxviii}

As a general rule, whether a change is material or substantial is a fact question. What is fundamental is the principle that materially changing solicitation specifications after receipt of responses denies an opportunity for others to participate in the solicitation. Therefore, any contract amendments are required to be within the scope of the original contract and the competitive process underlying the original contract.

It is important to remember that application of the above principles will depend upon your particular fact situation, and may not apply to the specifics of a request for proposal or request for offer. Always consult with your legal staff members before proceeding.

Administrative Changes

These are changes that are within the scope of the contract and do not affect or alter the rights of the parties. These changes are typically executed via a unilateral amendment. Examples of administrative changes include:

- Changes in billing instructions or address;
- Corrections of typographical errors not affecting the substance of the contract;
- Changes as permitted by the specific contract language.
- Changes in agency personnel assigned to the contract.

Substantive Changes

These are contractual changes that affect the rights of both parties. Such changes generally require bilateral amendments (agreement by both parties). Examples of substantive changes include:

- Change in the price of the contract.
- Change in the delivery schedule.
- Change in the quantity.
- Change or nature of deliverables. (i.e. the specifications)
- Change of key personnel.
- Change of any terms and conditions.

Constructive Changes

If a contractor perceives that work beyond the scope of the contract was ordered by the agency, the contractor may claim that the contract was “constructively” changed, and the contractor may be entitled to additional compensation for the changes. Generally, a constructive change will require a bilateral amendment. Constructive changes may occur when agency personnel:

- Provide suggestions to a contractor;
- Accelerate the delivery schedule;
- Direct the work to be performed differently;
- Change the sequencing of the work;
- Delay accepting or rejecting deliverables;
- Delay reviewing invoices and approving payment;
- Interfere with or hinders performance.

Dispute Resolution

Dispute resolution is covered by statute under Texas Government Code Chapter 2260 and it covers some of the contract claims against the state. The goal of any dispute resolution process is to resolve all problems before they escalate to the next level. To avoid escalation of problems to the next level and ensure the agency has not exacerbated potential problems, it is imperative that agency personnel respond promptly to all contractor inquiries. Initial steps to be taken are:

1. Identify the problem - many times what may appear to be a problem can be resolved by providing the contractor with information or clarification.
2. Research facts – the agency should obtain all the information regarding the potential problem from all relevant sources, including the project manager and the contractor.
3. Evaluation – the agency should review all of the facts in conjunction with the requirements and terms and conditions of the contract. The agency should then determine the appropriate course of action.

4. Proper dispute resolution is a core skill of successful contract management. Identification of problems early in the performance period, effectively communicating and formalizing the process in writing via a cure notice procedure or less formal written procedure is essential. A contract termination is a failure by BOTH parties to a contract. Termination is the last resort that rarely needs to be done.

Termination

When a contract is terminated, the parties are relieved from further unperformed obligations in accordance with the agreed terms and conditions. A contract may be terminated under distinct processes: Termination for Convenience and Termination for Default.

Termination for Convenience

A termination for convenience, also known as no-fault termination, allows the agency to terminate any contract, in whole or in part, at any time in its sole discretion, if it is determined that such termination is in the best interest of the agency.

- The agency shall provide the contractor with written notice specifying whether the agency is terminating all or part of the contract. The notice of termination shall give the date of termination. If the contract is being selectively terminated, the agency should specify which part(s) of the contract are being terminated.
- A termination notice should be issued which includes wording similar to:

Pursuant to Section ____, Termination, this contract is hereby terminated effective [date]. [Contractor name] is directed to immediately stop all work, terminate subcontracts, and place no further orders.

In accordance with this Notice of Termination, you shall:

- 1) Keep adequate records of your compliance with this notice, including the extent of completion on the date of termination.*
 - 2) Immediately notify all subcontractors and suppliers, if any, of this Notice of Termination.*
 - 3) Notify the agency Contract Administrator [name], of any and all matters that may be adversely affected by this Termination; and*
 - 4) Take any other action required by [agency name] to expedite this Termination.*
- The contractor will generally be paid for allowable costs incurred up to the termination. The agency will not be liable for payment to the contractor related to the terminated portion of the work or any work performed or costs incurred after the effective date of termination.
 - Upon receipt of any invoice from the contractor for work performed prior to the Notice of Termination, the agency should thoroughly review the invoice to ensure that no excessive costs are included.

Termination for Default

A contract may be terminated for default when the agency concludes that the contractor fails to perform, make progress, or in any way breaches the contract. An agency is not required to terminate a contract even though the circumstances permit such action. Agencies may determine that it is in their best interest to pursue other alternatives. Examples of such alternatives include extending the delivery or completion date, allowing the contractor to continue working or working with the contractor's surety to complete the outstanding work.

Termination for default should be used as last resort and not as punishment. The purpose of a termination for default is essentially to protect the interests of the agency while obtaining the necessary goods or services from another source.

Factors to consider prior to making a termination for default decision include:

- 1) Has the agency done everything within reason to assist the contractor in curing any default?
- 2) The provisions of the contract and applicable regulations.
- 3) The specific contractual failure(s) and the explanation provided for the failures.
- 4) The urgency of the need for the contracted supplies or services. The agency may need to weigh the respective benefits and/or disadvantages of allowing a delinquent contractor to continue performance or re-soliciting a new contractor.
- 5) The availability of the supplies or services from other sources and the time required to obtain them (compared to the additional time the current contractor needs to complete the work).
- 6) Availability of funds and/or resources to re-purchase in the event such costs cannot be recovered from the delinquent contractor. Under a termination for default, the agency is within its rights to demand re-procurement costs from the defaulting contractor. Nevertheless, the contractor may not be financially capable to finance the re-purchase, or such demand may result in protracted legal action.

If a vendor is terminated for default, the contractor is liable for actual damages and costs incurred by the state unless the contract states otherwise.^{lxix}

Excusable Causes. A contract may not be terminated for default when the failure to perform is due to excusable causes. In order to qualify as an excusable cause, the cause must be beyond the control, and without the fault or negligence of the contractor. Such excusable causes include, but are not limited to:

Acts of God or of the public enemy	Acts of the agency	Fires	Floods
Epidemics	Strikes	Freight embargos	Unusually severe weather*

*Severe weather, although beyond the contractor's control, will not generally constitute an excusable delay if it is not considered "unusually severe weather". For example, a snow storm in Amarillo in February would not be considered unusual, while it would be considered unusual in Austin. On the other hand, a snow storm in Amarillo in June would indeed be unusual.

If the contractor's failure to perform is due to the default of a subcontractor, in order to qualify as an excusable cause, the default must arise out of causes beyond the control and without the fault or negligence of both the contractor and the subcontractor. Even if this requirement is met, the cause will not be excusable if the supplies or services to be provided by the subcontractor could have been obtained from other sources in time to meet the contract delivery schedule.

See Legal Reference Section for additional information on issues related to Contractor Performance.^{lxxx}

Termination for Default Notifications

Prior to terminating a contractor for default, a cure notice should be sent to the contractor. A cure notice is a letter provided to the contractor that provides them a period of time, usually 10 days, to correct or "cure" the deficiency or violation. **Cure Notices.** The format for a cure notice may be as follows:

[Contractor name] is notified that the [agency name] considers [specify failures] a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days from the date of this letter, the [agency name] may terminate for default under the terms and conditions of the Termination clause of this contract. Another format for a cure notice is:

Since you have failed to perform the above referenced contract within the time required by its terms, the agency is considering terminating the contract under the provisions for default. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the questions to {agency point of contact} within 10 days from the date of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist.

Any assistance given to you on this contract or any acceptance by [agency name] of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of [agency name] to condone any delinquency or to waive any rights the [agency name] has under the contract.

Notice of Termination. If the contractor fails to cure the situation or provide a satisfactory explanation as requested, the contract may be terminated. The Notice of Termination should contain the following

- 1) The contract number, if any, and date of contract;
- 2) The effective date of termination;
- 3) Reference to the clause under which the contract is being terminated;
- 4) A concise, accurate statement of the facts justifying the termination; and
- 5) A statement that the supplies or services being terminated may be re-procured and that the contractor will be held liable for any additional costs incurred due to the re-purchase.^{bxxxi} Before including this statement, the contract should be reviewed to determine whether the right is available under the contract.

The Contract Administration File

Keeping one complete master contract administration file is critical. The file will provide a basis for settling claims and disputes should they arise in administrative or court actions. Throughout the life of the contract, the contract administration file should contain such things as:

- A copy of the current contract and all modifications;
- A copy of all specifications, drawings or manuals incorporated into the contract by reference;
- A reference list or a list of prior contracts with this specific vendor (if they offer valuable historical data);
- The solicitation document, the contractor's response, evaluation determination, and the notice of award document;
- A list of contractor submittal requirements;
- A list of government furnished property or services;
- A list of all information furnished to the contractor;
- A copy of the pre-award conference summary, if conducted;
- A schedule of compliance review, internal correspondence, if applicable;
- A copy of all general correspondence related to the contract;
- The originals of all contractor data or report submittals;

- A copy of all routine reports required by the contract such as sales reports, pricing schedules, approval requests, and inspection reports;
- A copy of all notices to proceed, to stop work, to correct deficiencies, or change orders;
- A copy of all letters of approval pertaining to such matters as materials, the contractor's quality control program, prospective employees, and work schedules;
- The records/minutes of all meetings, both internal and external. Include sign-in sheets and/or agendas;
- A copy of all contractor invoices, information relative to discount provisions for prompt payment, letters pertaining to contract deductions or fee adjustments;
- A copy of all backup documentation for contractor payment or progress payment; and copies of any audits.

Agencies should maintain an original of all contracts on file in a central repository. This allows contract managers to reference past or current contracts for useful information relating to a current project.

Contract Close-Out

The contract close-out process is usually a simple but detailed administrative procedure. The purpose is to verify that both parties to the contract have fulfilled their contractual obligations and there are no responsibilities remaining. In addition, contract close-out is the time to assess the success of the contract and determine if there are any lessons learned for future contracting.

A contract is completed when all goods or services have been received and accepted; all reports have been delivered and accepted; all administrative actions have been accomplished; all agency furnished equipment and material have been returned; and final payment has been made to the contractor.

To initiate the close-out process, the agency should first determine that the contractor has satisfactorily performed all required contractual obligations. A contract is ready for close out when:

- All deliverables, including reports have been delivered and accepted by the agency. Contract managers should compare actual performance against performance measures, goals and objectives to determine whether all required work has been completed;
- Final payment has been made;
- All monitoring issues have been resolved
- All property inventory and ownership issues are resolved including disposition of any equipment or licenses purchased under the contract;
- Final acceptance from the Project Manager has been received (if applicable); and
- Contractor is aware of and in compliance with records retention requirements and a plan has been developed for contract file maintenance.
- Any deficiencies found as part of the closeout process are documented and communicated to all appropriate parties.

Grants have specific contract close out requirements. These requirements can be found in the Uniform Grant Management Standards published by the Governor's Office.
<http://www.governor.state.tx.us/divisions/stategrants/guidelines/view>

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Appendix 1

[Insert TITLE here]

SECTION I GENERAL

1.1 SCOPE. The State of Texas, by and through the _____ {Insert agency name here} seeks [Insert general description here] services in accordance with the specifications contained in this Request for Proposal ("RFP"). In particular, the services requested herein and to be provided under any contract(s) awarded as a result of this RFP are for _____ [Insert the specific services and purpose].

[The following to be included only when soliciting for IDQ or Requirements contracts:]

No Guarantee of Volume. The State of Texas does not guarantee any specific amount of compensation, volume, minimum, or maximum amount of services under this solicitation and resulting contract. *[It is recommended that you provide some sort of past performance and or reporting data to assist vendors in their Proposals].*

1.2 CONTRACT TERM. The services requested shall be provided for a period of _____ [state initial term, ex. Two (2) years], beginning _____ [insert start date], or the last signature date, whichever is later, and ending _____ [Length of contract term should not extend past end of biennium in which execution of contract occurs, i.e. no later than August 31, 2008]. *[If applicable, include the following]* This contract may be renewed for up to [state renewal options, ex. three (3) one (1) year renewal options] upon mutual agreement of the parties to be evidenced in writing prior to the expiration date of the initial term. *[Length of renewal term should run so it expires within biennium]*

1.3 COMPENSATION. [Insert compensation details here]

1.4 DEFINITIONS. For purposes of this RFP, the following definitions apply:

[The following is a list of generic definitions to be used only if the terms appear in the RFP]

- (a) Acceptable Quality Level - The level of performance of requested services below which the contract will not be paid or damages may be assessed;
- (b) Addendum - A modification of the specifications issued by _____ {Insert agency name here} and distributed to prospective Respondents prior to the opening of responses;
- (c) Best and Final Offer ("BAFO")- A formal request made to selected Respondents for revisions to the originally submitted Proposal;
- (d) Contract – The contract awarded as a result of this RFP and all exhibits thereto., This RFP, any Addendum issued in conjunction with this RFP, the successful Respondent's Proposal, any BAFO, and subsequent submission by Respondent, shall all be fully incorporated therein as exhibits; and
- (e) Contractor – Respondent whose Proposal results in a contract with _____ {Insert agency name here}.

[List any additional definitions here that may specifically apply to the RFP.]

SECTION II STATEMENT OF WORK

2.1 SERVICE REQUIREMENTS. Services shall include, but are not limited to, the requirements contained in this RFP. Services set forth that contain the words "must" or "shall" are mandatory and must be provided as specified with no alteration, modification, or exception. Services set forth that contain the words "may" or "can" allow Respondents to offer alternatives to the manner in which the services are provided. The requested services and corresponding deliverables are as follows: *[List description of services and specific forms of deliverables here.]*

2.2 SUBCONTRACTORS. Subcontractors providing services under the Contract shall meet the same requirements and level of experience as required of Respondent. No subcontract under the Contract shall relieve Respondent of

responsibility for ensuring the requested services are provided. Respondents planning to subcontract all or a portion of the work to be performed shall identify the proposed subcontractors.

2.3 PERFORMANCE TRACKING. *{Insert agency name here}* will monitor the performance of the Contract issued under this RFP. All services under the Contract shall be performed at an acceptable quality level and in a manner consistent with acceptable industry standards, custom, and practice.

[List performance measures, reports, deliverables, and other tracking data here.]

example:
_____ {Insert agency name here} may consider the following performance by Contractor as unsatisfactory performance. An unsatisfactory performance determination is not limited to the following:

- (a) In excess of one (1) service “call back” to correct the same problem within thirty (30) calendar days.*
- (b) In excess of one (1) instance within one (1) calendar year of Contractor personnel assigned to an authorized service call not having the skill or knowledge to diagnose the problem and/or perform the repair.*
- (c) In excess of two (2) instances within one (1) calendar year of which response time to a service call exceeds the thirty (30) minute response by telephone and two (2) hour on-site limit, as defined in this specification above in Section 1.3].*

**SECTION III
PROPOSAL INFORMATION**

3.1 SCHEDULE OF EVENTS. The solicitation process for this RFP will proceed according to the following schedule:

EVENT	DATE
Issue RFP	
Pre-Proposal Conference	
Deadline for Submission of Questions	
Deadline for Submission of Proposals/RFP	
Opening	
Expected Award of Contract	
Expected Contract Start Date	

3.2 REVISIONS TO SCHEDULE. _____ *{Insert agency name here}* reserves the right to change the dates in the schedule of events above upon written notification to prospective Respondents through a posting on the Electronic State Business Daily as an Addendum.

3.3 PRE-PROPOSAL CONFERENCE. Attendance at the pre-Proposal conference *[insert applicable: is/is not]* mandatory. A pre-proposal conference is scheduled for *[list date(s), day of the week, and time here]* (Central Daylight Time). The location of the pre-proposal conference is *[list Building Name and/or address, room number, etc. here]*.

3.4 PROPOSAL REQUIREMENTS.

- (a) Submissions: Respondents shall submit one original of *[list Exhibit A HUB Subcontracting Plan, for solicitations over \$100K]*, and one original *Exhibit B, Execution of Proposal*, along with one (1) original and *[state number of copies here]* copies of the Proposal. Proposal pages should be numbered and contain an organized, paginated table of contents corresponding to the section and pages of the Proposal.
- (b) Costs: Respondents to this RFP are responsible for all costs of Proposal preparation.
- (c) *{Insert agency name here}* will not consider any Proposal that bears a copyright. Proposals will be subject to the Texas Public Information Act, Tex. Government Code, Chapter 552, and may be disclosed to the public upon request. Subject to the Act, Respondents may protect trade and confidential information from public release. Trade secrets or other confidential information, submitted as part of a Proposal, shall be clearly marked at each page it appears. Such marking shall be in boldface type at least **14 point font**.

(d) Contents: Listed below is a summary of all information to be included in a Proposal submitted in response to this RFP. {Insert agency name here} reserves the right, in its sole judgment and discretion, to waive minor technicalities and errors in the best interest of the state.

- (1) Respondent Information: Include the following information related to the responding business entity: formal name and all assumed names used by the business entity; structure of business entity (i.e. sole proprietorship, partnership, corporation, etc.); state in which business entity was formed or incorporated; physical address and mailing address; principal place of business; whether, and to what extent, Respondent has established a physical presence in the State of Texas including relevant timeframes; and name, title, address, telephone number, facsimile number, and e-mail address of Respondent's primary contact.
- (2) Exhibit A—Historically Underutilized Businesses (HUB) Subcontracting Plan: The HUB Subcontracting Plan (the "Plan") shall be completed, signed, and returned with the Proposal. Include all subcontractors on the Plan; state whether each subcontractor has been certified as a HUB by the State of Texas; and if certified, provide the most recent date of certification. Complete the remainder of the Plan forms as directed. Failure to complete and return the Plan with the submitted Proposal will result in rejection of the Proposal.
- (3) Exhibit B – Execution of Proposal: Failure to sign and return the Execution of Proposal with the submitted Proposal will result in rejection of the Proposal.
- (4) Exhibit C – Compensation and Fees: Provide requested information as directed.

[List any other applicable Exhibits or required documents, (such as an Excel sheet for pricing), associated with the solicitation]

- (5) Proposed Products/Services: With respect to each of the services outlined in Section 2.1, provide the information requested below:

[Other examples of Proposal Contents:]

Experience and Qualifications: Describe services your organization has provided in the past 5 years that demonstrates your organization's capability to carry out the proposed services. Include the nature of the services provided, scope of activities, and the organization for which the service was provided. Also, provide any experience in providing similar services to public entities. Include resumes for all personnel who will be responsible for the management and day-to-day operations of the products/services solicited in this RFP.

Compensation and Fees: Provide a compensation schedule for each product/service to be performed in response to this RFP, including an estimated maximum amount. This information should be included on list Compensation and Fees Exhibit, if applicable, here.

References: Include a minimum of three (3) references from clients for whom similar services were performed or products were provided. Include project description, contact names, position, and company name and telephone number for each reference listed.]

3.5 INQUIRIES.

- (a) All inquiries shall be submitted in writing to [list Purchaser name here] at facsimile [list fax number here] or by e-mail to [list email address here] by [list date for deadline of submission of questions here; must match Schedule of Events listed in Section 3.1 above] Central Daylight Time, the date listed as the deadline for submission of questions as specified in Section 3.1 above.
- (b) All inquiries will result in written responses with copies posted to the Electronic State Business Daily, available at <http://esbd.cpa.state.tx.us>. If a Respondent does not have Internet access, a copy of all written responses may be obtained through the point of contact listed above.
- (c) Except as otherwise provided in this Section, upon issuance of this RFP, other employees and representatives of {Insert agency name here} will not answer questions or otherwise discuss the contents of the RFP with any potential Respondent or its representatives. Failure to observe this restriction may result in disqualification of any subsequent response. This restriction does not preclude discussions unrelated to this RFP.

(d) If Respondent takes any exceptions to any provisions of this RFP, these exceptions must be specifically and clearly identified by Section in Respondent's Proposal in response to this RFP and Respondent's proposed alternative must also be provided in the Proposal. Respondents cannot take a 'blanket exception' to this entire RFP. If any Respondent takes a 'blanket exception' to this entire RFP or does not provide proposed alternative language, the Respondent's Proposal may be disqualified from further consideration.

Respondents are strongly encouraged to submit written questions during the official question and answer period regarding any term or condition of this RFP and whether *[Insert name of agency here]* may negotiate that provision under this particular RFP.

3.6 PROPOSAL SUBMISSION.

(a) All Proposals shall be received and time stamped at *{Insert agency name here}* prior to *[insert time of RFP Opening here]*, Central Daylight Time, on the date specified in the Schedule of Events above. *{Insert agency name here}* reserves the right to reject late submittals.

(b) Proposals should be placed in a separate envelope or package and correctly identified with the RFP number and submittal deadline/RFP opening date and time. It is Respondent's responsibility to appropriately mark and deliver the Proposal to _____ *{Insert agency name here}* by the specified date.

(c) Telephone and facsimile Proposals will not be accepted.

(d) Receipt of all addenda to this RFP should be acknowledged by returning a signed copy of each addendum with the submitted Proposal.

3.7 DELIVERY OF PROPOSALS. Proposals shall be submitted to *{Insert agency name here}* by one of the following methods:

U.S. Postal Service	Overnight/Express Mail	Hand Deliver
<i>{Insert appropriate Agency Name and Mailing Address here}.</i>	<i>{Insert appropriate Agency Name and Mailing Address here}.</i>	<i>{Insert appropriate Agency Name and Physical Address here}.</i> Hours – 8:00 AM to 5:00 PM (C.D.T.)

3.8 PROPOSAL OPENING. Proposals will be opened at the *{Insert appropriate Agency Name and Mailing Address here}*.

(a) All submitted Proposals become the property of *{Insert agency name here}* after the RFP submittal deadline/opening date.

(b) Proposals submitted shall constitute an offer for a period of ninety (90) days or until selection is made by *{Insert agency name here}*, whichever occurs earlier.

3.9 PROPOSAL EVALUATION AND AWARD.

a) *{Insert agency name here}* shall award a contract to a Respondent whose Proposal is considered to provide the best value to the State of Texas, as defined by Tex. Government Code, Section 2155.074.

b) A committee will be established to evaluate the Proposals. The committee will include employees of *{Insert agency name here}* and other persons invited by *{Insert agency name here}* to participate.

c) The evaluation committee will determine best value by applying the following criteria and assigned weighted values:

[Example:

Criteria

Weight

Company Information

5%

<u>Proposed Services</u>	<u>5%</u>
<u>Experience and Qualifications</u>	<u>10%</u>
<u>Compensation and Fees</u>	<u>70%</u>
<u>References</u>	<u>10%</u>
	<u>100%</u>

- d) The evaluation committee will determine if Best and Final Offers are necessary. Award of a contract may be made without Best and Final Offers. *{Insert agency name here}* may, at its discretion, elect to have Respondents provide oral presentations and respond to inquiries from the evaluation committee related to their Proposals. A request for a Best and Final Offer is at the sole discretion of *{Insert agency name here}* and will be extended in writing.
- e) In evaluating Proposals to determine the best value for the State, *{Insert agency name here}* may consider information related to past contract performance of a Respondent including, but not limited to, the Texas Comptroller of Public Accounts Vendor Performance Tracking System (available at http://www.window.state.tx.us/procurement/prog/vendor_performance).

SECTION IV

GENERAL TERMS AND CONDITIONS

4.1 Any Contract awarded as a result of this RFP will contain the general terms and conditions listed below in this Section. Subcontractors are also obliged to comply with these provisions.

CONTRACT TO PERFORM

1. BETWEEN

{Insert agency name here} AND

Contract No. _____

This agreement ("Contract") is entered into by the *{Insert agency name here}*, an agency of the State of Texas, and _____ ("Contractor"), located at _____.

I. Recitals

Whereas, on _____, 2007 *{Insert agency name here}* issued a Request for Proposals from qualified, independent firms to _____ and on _____, 2007 issued its official response to questions (collectively "RFP"); and

Whereas, Contractor submitted a proposal (Proposal) dated _____, 2007, in response to *{Insert agency name here}* RFP; and

Whereas, Contractor was selected to _____ (short statement of the work to be performed;

Now Therefore, the *{Insert agency name here}* and Contractor hereby agree as follows:

II. Authority

This Contract is entered into pursuant to _____.

III. Services, Standards of Performance and Contract Administration

Contractor shall provide the services and the deliverables described herein in the manner required by all of the following documents:

1. This Contract
2. Exhibit A: The Statement of Work
3. Exhibit B: The RFP and Addenda

4. Exhibit C: Authorized Key Personnel List
 5. Exhibit D: Contractor's Proposal and Contractor's Best and Final Offer
- [List any additional exhibits here in the order they appear in RFP.]*

All of the above are attached to and incorporated as part of this Contract for all purposes. All of these documents constitute the Standards of Performance for this Contract.

In the case of conflicts between this Contract and any of the above exhibits, the following shall control in this order of priority:

1. This Contract
 2. Exhibit A: The Statement of Work
 3. Exhibit B: The RFP
 4. Exhibit C: Authorized Key Personnel List
 5. Exhibit D: Contractor's Proposal and Contractor's Best and Final Offer
- [List any additional exhibits here in the order they appear in RFP.]*

Contractor shall provide all of the above services and all reasonably related services in accordance with applicable professional standards of a Contractor providing _____. Contractor represents and warrants that it has the requisite qualifications, experience, personnel and other resources to perform in the manner required by this Contract.

{Insert agency name here} shall designate a Project Manager for this Contract. The Project Manager will serve as the point of contact between the *{Insert agency name here}* and Contractor. *{Insert agency name here}* Project Manager shall supervise *{Insert agency name here}* review of Contractor's technical work, deliverables, draft reports, the final report, payment requests, schedules, financial budget administration and similar matters. The Project Manager does not have any express or implied authority to vary the terms of the Contract, amend the Contract in any way or waive strict performance of the terms or conditions of the Contract.

IV. Personnel

Contractor shall assign only qualified personnel to this Contract. On the date of *{Insert agency name here}* execution of this Contract, *{Insert agency name here}* project manager shall authorize the key personnel listed in Exhibit D of this Contract to provide services under this Contract. Contractor, in its reasonable discretion, reserves the right to substitute appropriate key personnel to accomplish its duties so long as the substituted personnel are equally qualified and skilled in the tasks necessary to accomplish the tasks and services required. Contractor shall provide to *{Insert agency name here}* prior written notice of any proposed change in key personnel involved in providing services under this Contract.

Subcontractors providing services under the Contract shall meet the same requirements and level of experience as required of Contractor. No subcontract under the Contract shall relieve Contractor of responsibility for ensuring the requested services are provided. If Contractor uses a subcontractor for any or all of the work required, the following conditions shall apply:

- (a) Contractors planning to subcontract all or a portion of the work to be performed shall identify the proposed subcontractors.
- (b) Subcontracting shall be solely at Contractor's expense.
- (c) *{Insert agency name here}* retains the right to check subcontractor's background and approve or reject the use of submitted subcontractors.
- (d) Contractor shall be the sole contact for *{Insert agency name here}*. Contractor shall list a designated point of contact for all *{Insert agency name here}* inquiries.

V. Payments

Prior to authorizing payment to Contractor, *{Insert agency name here}* shall evaluate Contractor's performance using the performance standards set forth in all documents constituting this Contract. Contractor shall provide invoices to *{Insert agency name here}* for Services performed. Invoices must be submitted not later than the 15th day of the month after the Services are completed. No payment whatsoever shall be made under this contract without the prior submission of detailed, correct invoices. Subject to the foregoing, *{Insert agency name here}* must make all payments

in accordance with the Texas Prompt Payment Act, *Government Code*, Chapter 2251. Payments under this Contract are subject to the availability of appropriated funds. Contractor acknowledges and agrees that payments for services provided under this Contract are contingent upon *{Insert agency name here}* receipt of funds appropriated by the Texas Legislature.

VI. Term and Termination

This Contract shall become effective on the date signed by the appropriate official of *{Insert agency name here}* and shall expire on _____ unless otherwise sooner terminated as provided in this Contract. Notwithstanding the termination or expiration of this Contract, the provisions of this Contract regarding confidentiality, indemnification, transition, records, right to audit and independent audit, property rights, dispute resolution, invoice and fees verification, and default shall survive the termination or expiration dates of this Contract. *{Insert agency name here}* may, in its sole discretion, terminate this Contract upon thirty (30) days' written notice to Contractor. Such notice may be provided by facsimile or certified mail, return receipt requested and is effective upon Contractor's receipt.

VII. Confidentiality and Open Records

Notwithstanding any provisions of this Contract to the contrary, Contractor understands that *{Insert agency name here}* will comply with the Texas Public Information Act, *Government Code*, Chapter 552 as interpreted by judicial opinions and opinions of the Attorney General of the State of Texas. *{Insert agency name here}* agrees to notify Contractor in writing within a reasonable time from receipt of a request for information related to Contractor's work under this contract. Contractor will cooperate with *{Insert agency name here}* in the production of documents responsive to the request. *{Insert agency name here}* will make a determination whether to submit a Public Information Act request to the Attorney General. Contractor will notify *{Insert agency name here}* General Counsel within twenty-four (24) hours of receipt of any third party requests for information that was provided by the State of Texas for use in performing the Contract. This Contract and all data and other information generated or otherwise obtained in its performance may be subject to the Texas Public Information Act. Contractor agrees to maintain the confidentiality of information received from the State of Texas during the performance of this Contract, including information which discloses confidential personal information particularly, but not limited to, social security numbers.

VIII. Insurance and Other Security

Contractor represents and warrants that it will, within five (5) business days of executing this agreement, provide *{Insert agency name here}* with current certificates of insurance or other proof acceptable to *{Insert agency name here}* of the following insurance coverage:

Standard Workers Compensation Insurance covering all personnel who will provide services under this Contract;

Commercial General Liability Insurance, personal injury and advertising injury with, at a minimum, the following limits: \$500,000 minimum each occurrence; \$1,000,000 per general aggregate.

Contractor represents and warrants that all of the above coverage is with companies licensed in the state of Texas, with "A" rating from Best, and authorized to provide the corresponding coverage. Contractor also represents and warrants that all policies contain endorsements prohibiting cancellation except upon at least thirty (30) days prior written notice to *{Insert agency name here}*. Contractor represents and warrants that it shall maintain the above insurance coverage during the term of this Contract, and shall provide *{Insert agency name here}* with an executed copy of the policies immediately upon request.

IX. INDEMNIFICATION

CONTRACTOR SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS THE STATE OF TEXAS, ITS OFFICERS, AND EMPLOYEES, AND [INSERT NAME OF AGENCY HERE], ITS OFFICERS, AND EMPLOYEES AND CONTRACTORS, FROM AND AGAINST ALL CLAIMS, ACTIONS, SUITS, DEMANDS, PROCEEDINGS, COSTS, DAMAGES, AND LIABILITIES, INCLUDING WITHOUT LIMITATION ATTORNEYS' FEES AND COURT COSTS, ARISING OUT OF, CONNECTED WITH, OR RESULTING FROM ANY ACTS OR OMISSIONS OF CONTRACTOR OR ANY AGENT, EMPLOYEE, SUBCONTRACTOR, OR SUPPLIER OF CONTRACTOR IN THE EXECUTION OR PERFORMANCE OF THIS CONTRACT. CONTRACTOR SHALL COORDINATE ITS DEFENSE WITH THE TEXAS ATTORNEY GENERAL AS REQUESTED BY [INSERT NAME OF AGENCY HERE].

THIS PARAGRAPH IS NOT INTENDED TO AND SHALL NOT BE CONSTRUED TO REQUIRE CONTRACTOR TO INDEMNIFY OR HOLD HARMLESS THE STATE OR [INSERT NAME OF AGENCY HERE] FOR ANY CLAIMS OR

LIABILITIES RESULTING FROM THE NEGLIGENT ACTS OR OMISSIONS OF [INSERT NAME OF AGENCY HERE] OR ITS EMPLOYEES.

X. Dispute Resolution

The dispute resolution process provided for in Texas *Government Code*, Chapter 2260 shall be used by {Insert agency name here} and Contractor to resolve any dispute arising under the Contract.

XI. Representations, Warranties, and General Provisions

11.1. Family Code

Under Section 231.006 of the Texas Family Code (relating to child support), Contractor represents and warrants that Contractor is not ineligible to receive the specified payment and acknowledges that this Contract may be terminated and payment withheld if this representation and warranty is inaccurate.

11.2. Eligibility

Under Government Code, Section 2155.004 (relating to certain taxes), Contractor represents and warrants that Contractor is not ineligible to receive this Contract and acknowledges that this Contract may be terminated and payment withheld if this representation and warranty is inaccurate. Contractor represents and warrants that it is not delinquent in the payment of any franchise taxes owed the State of Texas.

11.3. Liability for Taxes

Contractor represents and warrants that it shall pay all taxes or similar amounts resulting from this Contract, including, but not limited to, any federal, State, or local income, sales or excise taxes of Contractor or its employees. {Insert agency name here} shall not be liable for any taxes resulting from this Contract.

11.4. HUBs

Contractor represents and warrants that it shall comply with the Historically Underutilized Business requirements pursuant to Government Code, Chapter 2261.

11.5. Amendments

Except as provided in Section 11.12 of this Contract, this Contract may be amended only upon written agreement between {Insert agency name here} and Contractor; however, any amendment of this Contract that conflicts with the laws of the State of Texas shall be void ab initio.

11.6. Applicable Law; Venue

This Contract shall be governed by and construed in accordance with the laws of the State of Texas. The venue of any suit arising under this Contract is fixed in any court of competent jurisdiction of Travis County, Texas.

11.7. Strict Compliance

Time is of the essence in the performance of this Contract. Contractor shall strictly comply with all of the deadlines, requirements, and Standards of Performance for this Contract.

11.8. Assignments

Without the prior written consent of {Insert agency name here} Contractor may not assign this Contract, in whole or in part, and may not assign any right or duty required under it.

11.9. Partially Completed Work

No later than the first calendar day after the termination of this Contract, or at {Insert agency name here} request, Contractor shall deliver to {Insert agency name here} all completed, or partially completed, work and any and all documentation or other products and results of these services. Failure to timely deliver such work or any and all

documentation or other products and results of the services shall be considered a material breach of this Contract. Contractor shall not make or retain any copies of the work or any and all documentation or other products and results of the services without the prior written consent of the *{Insert agency name here}*.

11.10. Federal, State, and Local Requirements

Contractor shall demonstrate on-site compliance with the Federal Tax Reform Act of 1986, Section 1706, amending Section 530 of the Revenue Act of 1978, dealing with issuance of Form W-2's to common law employees. Contractor is responsible for both federal and State unemployment insurance coverage and standard Worker's Compensation Insurance coverage. Contractor shall comply with all federal and State tax laws and withholding requirements. The State of Texas shall not be liable to Contractor or its employees for any Unemployment or Workers' Compensation coverage, or federal or State withholding requirements. Contractor shall indemnify the State of Texas and shall pay all costs, penalties, or losses resulting from Contractor's omission or breach of this Section.

11.11. Severability Clause

In the event that any provision of this Contract is later determined to be invalid, void, or unenforceable, then the remaining terms, provisions, covenants, and conditions of this Contract shall remain in full force and effect, and shall in no way be affected, impaired, or invalidated.

11.12. Applicable Law and Conforming Amendments

Contractor must comply with all laws, regulations, requirements and guidelines applicable to a Contractor providing services to the State of Texas as these laws, regulations, requirements and guidelines currently exist and as they are amended throughout the term of this Contract. *{Insert agency name here}* reserves the right, in its sole discretion, to unilaterally amend this Contract throughout its term to incorporate any modifications necessary for *{Insert agency name here}* or Contractor's compliance with all applicable State and federal laws, and regulations.

11.13. No Waiver

Nothing in this Contract shall be construed as a waiver of the state's sovereign immunity. This Contract shall not constitute or be construed as a waiver of any of the privileges, rights, defenses, remedies, or immunities available to the State of Texas. The failure to enforce, or any delay in the enforcement, of any privileges, rights, defenses, remedies, or immunities available to the State of Texas under this Contract or under applicable law shall not constitute a waiver of such privileges, rights, defenses, remedies, or immunities or be considered as a basis for estoppel. *{Insert agency name here}* does not waive any privileges, rights, defenses, or immunities available to *{Insert agency name here}* by entering into this Contract or by its conduct prior to or subsequent to entering into this Contract.

11.14. No Liability Upon Termination

If this Contract is terminated for any reason, *{Insert agency name here}* and the State of Texas shall not be liable to Contractor for any damages, claims, losses, or any other amounts arising from or related to any such termination. However, Contractor may be entitled to the remedies provided in Government Code, Chapter 2260.

11.15. Independent Contractor

Contractor or Contractor's employees, representatives, agents and any subcontractors shall serve as an independent contractor in providing the services under any PO resulting from this RFP. Contractor or Contractor's employees, representatives, agents and any subcontractors shall not be employees of *{Insert agency name here}*. Should Contractor subcontract any of the services required in this RFP, Contractor expressly understands and acknowledges that in entering into such subcontract(s), *{Insert agency name here}* is in no manner liable to any subcontractor(s) of Contractor. In no event shall this provision relieve bidder of the responsibility for ensuring that the services rendered under all subcontracts are rendered in compliance with this RFP.

11.16. Limitation on Authority; No Other Obligations

Contractor shall have no authority to act for or on behalf of *{Insert agency name here}* or the State of Texas except as expressly provided for in this Contract; no other authority, power or use is granted or implied. Contractor may not incur any debts, obligations, expenses, or liabilities of any kind on behalf of the State of Texas or *{Insert agency name here}*.

11.17. Patent, Trademark, Copyright and Other Infringement Claims

Contractor shall indemnify, save and hold harmless the State of Texas from and against claims of patent, trademark, copyright, trade secret or other proprietary rights, violations or infringements arising from the State's or Contractor's use of or acquisition of any services or other items provided to the State of Texas by Contractor or otherwise to which the State of Texas has access as a result of Contractor's performance under this Contract, provided that the State shall notify Contractor of any such claim within a reasonable time of the State's receiving notice of any such claim. If Contractor is notified of any claim subject to this section, Contractor shall notify *{Insert agency name here}* of such claim within five (5) business days of such notice. No settlement of any such claim shall be made by Contractor without *{Insert agency name here}* prior written approval. Contractor shall reimburse the State of Texas for any claims, damages, losses, costs, expenses, judgments or any other amounts, including, but not limited to, attorneys' fees and court costs, arising from any such claim. Contractor shall pay all reasonable costs of the State's counsel and shall also pay costs of multiple counsel, if required to avoid conflicts of interest. Contractor represents that it has determined what licenses, patents and permits are required under this Contract and has acquired all such licenses, patents and permits.

11.18. Supporting Documents, Retention; Right to Audit; Independent Audits

Contractor shall maintain and retain supporting fiscal and any other documents relevant to showing that any payments under this Contract funds were expended in accordance with the laws and regulations of the State of Texas, including but not limited to, requirements of the Comptroller of the State of Texas and the State Auditor. Contractor shall maintain all such documents and other records relating to this Contract and the State's property for a period of four (4) years after the date of submission of the final invoices or until a resolution of all billing questions, whichever is later. Contractor shall make available at reasonable times and upon reasonable notice, and for reasonable periods, all documents and other information related to the "Work" as defined in paragraph 11.30 of this Contract. Contractor and the subcontractors shall provide the State Auditor with any information that the State Auditor deems relevant to any investigation or audit. Contractor must retain all work and other supporting documents pertaining to this Contract, for purposes of inspecting, monitoring, auditing, or evaluating by *{Insert agency name here}* and any authorized agency of the State of Texas, including an investigation or audit by the State Auditor.

Contractor shall cooperate with any authorized agents of the State of Texas and shall provide them with prompt access to all of such State's work as requested. Contractor's failure to comply with this Section shall constitute a material breach of this Contract and shall authorize the *{Insert agency name here}* and the State of Texas to immediately assess appropriate damages for such failure. The acceptance of funds by Contractor or any other entity or person directly under this Contract, or indirectly through a subcontract under this Contract, shall constitute acceptance of the authority of the State Auditor to conduct an audit or investigation in connection with those funds. Contractor acknowledges and understands that the acceptance of funds under this Contract shall constitute consent to an audit by the State Auditor, Comptroller or other agency of the State of Texas. Contractor shall ensure that this paragraph concerning the State's authority to audit funds received indirectly by subcontractors through Contractor and the requirement to cooperate is included in any subcontract it awards. Furthermore, under the direction of the legislative audit committee, an entity that is the subject of an audit or investigation by the State Auditor must provide the State Auditor with access to any information the State Auditor considers relevant to the investigation or audit.

11.19. Deceptive Trade Practices; Unfair Business Practices

Contractor represents and warrants that it has not been the subject of allegations of Deceptive Trade Practices violations under Tex. Bus. & Com. Code, Chapter 17, or allegations of any unfair business practice in any administrative hearing or court suit and that Contractor has not been found to be liable for such practices in such proceedings. Contractor certifies that it has no officers who have served as officers of other entities who have been the subject allegations of Deceptive Trade Practices violations or allegations of any unfair business practices in an administrative hearing or court suit and that such officers have not been found to be liable for such practices in such proceedings.

11.20. Equal Opportunity

Contractor represents and warrants that it shall not discriminate against any person on the basis of race, color, national origin, creed, religion, political belief, sex, sexual orientation, age, and disability in the performance of this Contract.

11.21. Antitrust

Contractor represents and warrants that neither Contractor nor any firm, corporation, partnership, or institution represented by Contractor, or anyone acting for such firm, corporation or institution has (1) violated the antitrust laws of the State of Texas under Tex. Bus. & Com. Code, Chapter 15, or the federal antitrust laws; or (2) communicated directly or indirectly the Proposal to any competitor or any other person engaged in such line of business during the procurement process for this Contract.

11.22. No Conflicts

Contractor represents and warrants that Contractor has no actual or potential conflicts of interest in providing services to the State of Texas under this Contract and that Contractor's provision of services under this Contract would not reasonably create an appearance of impropriety.

11.23. Financial Interests; Gifts

Contractor represents and warrants that neither Contractor nor any person or entity that will participate financially in this Contract has received compensation from *{Insert agency name here}* or any agency of the State of Texas for participation in preparation of specifications for this Contract. Contractor represents and warrants that it has not given, offered to give, and does not intend to give at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor or service to any public servant or employee in connection with this Contract.

11.24. Felony Criminal Convictions

Contractor represents and warrants that Contractor has not and Contractor's employees have not been convicted of a felony criminal offense, or that, if such a conviction has occurred, Contractor has fully advised *{Insert agency name here}* as to the facts and circumstances surrounding the conviction.

11.25. Notices

Any written notices required under this Contract will be by either hand delivery to Contractor's office address specified on Page 1 of this Contract or by U.S. Mail, certified, return receipt requested, to *[Insert appropriate agency name and mailing address here]*. Notice will be effective on receipt by the affected party. Either party may change the designated notice address in this Section by written notification to the other party.

11.26. False Statements; Breach of Representations

By signature to this Contract, Contractor makes all the representations, warranties, guarantees, certifications and affirmations included in this Contract. If Contractor signed its Proposal with a false statement or signs this Contract with a false statement or it is subsequently determined that Contractor has violated any of the representations, warranties, guarantees, certifications or affirmations included in this Contract, Contractor shall be in default under this Contract and *{Insert agency name here}* may terminate or void this Contract for cause and pursue other remedies available to *{Insert agency name here}* under this Contract and applicable law.

11.27. Force Majeure

Neither Contractor nor *{Insert agency name here}* shall be liable to the other for any delay in, or failure of performance, of any requirement included in any PO resulting from this RFP caused by force majeure. The existence of such causes of delay or failure shall extend the period of performance until after the causes of delay or failure have been removed provided the non-performing party exercises all reasonable due diligence to perform. Force majeure is defined as acts of God, war, fires, explosions, hurricanes, floods, failure of transportation, or other causes that are beyond the reasonable control of either party and that by exercise of due foresight such party could not reasonably have been expected to avoid, and which, by the exercise of all reasonable due diligence, such party is unable to overcome. Each party must inform the other in writing, with proof of receipt, within three (3) business days of the existence of such force majeure, or otherwise waive this right as a defense.

11.28. Debts or Delinquencies to State

The Comptroller is prohibited from issuing any payment to a person or entity that has been reported as having an indebtedness or delinquency to the state. Contractor agrees that, to the extent Contractor owes any debt or delinquent taxes to the State of Texas, any payments or other amounts Contractor is otherwise owed under this Contract shall be applied toward the debt or delinquent taxes until the debt or delinquent taxes are paid in full. Contractor agrees to comply with all applicable laws regarding satisfaction of debts or delinquencies to the State of Texas.

11.29. Contracts for Services

In accordance with Government Code, Section 2155.4441, the State of Texas requires that during the performance of a contract for services, Contractor shall purchase products and materials produced in the State of Texas when available at a price and time comparable to products and materials produced outside the state.

11.30. Work Made for Hire

For the purposes of this Contract, the term "Work" is defined as all reports, statistical analyses, work papers, work products, materials, approaches, designs, specifications, systems, documentation, methodologies, concepts, research materials, intellectual property or other property developed, produced, or generated in connection with this Contract. All work performed pursuant to this Contract is made the exclusive property of *{Insert agency name here}*. All right, title and interest in and to said property shall vest in *{Insert agency name here}* upon creation and shall be deemed to be a work for hire and made in the course of the services rendered pursuant to this Contract. To the extent that title to any such work may not, by operation of law, vest in *{Insert agency name here}*, or such work may not be considered a work made for hire, all rights, title and interest therein are hereby irrevocably assigned to *{Insert agency name here}*. *{Insert agency name here}* shall have the right to obtain and to hold in its name any and all patents, copyrights, registrations or such other protection as may be appropriate to the subject matter, and any extensions and renewals thereof. Contractor must give *{Insert agency name here}* and/or the State of Texas, as well as any person designated by *{Insert agency name here}* and/or the State of Texas, all assistance required to perfect the rights defined herein without any charge or expense beyond those amounts payable to Contractor for the services rendered under this Contract.

11.31. Electronic and Information Resources Accessibility Standards, As Required by 1 TAC Chapter 213 (Applicable to State Agency and Institution of Higher Education Purchases Only)

1) Effective September 1, 2006 state agencies and institutions of higher education shall procure products which comply with the State of Texas Accessibility requirements for Electronic and Information Resources specified in 1 TAC Chapter 213 when such products are available in the commercial marketplace or when such products are developed in response to a procurement solicitation.

2) Vendor shall provide DIR with the URL to its Voluntary Product Accessibility Template (VPAT) for reviewing compliance with the State of Texas Accessibility requirements (based on the federal standards established under Section 508 of the Rehabilitation Act), or indicate that the product/service accessibility information is available from the General Services Administration "Buy Accessible Wizard" (<http://www.buyaccessible.gov>). Vendors not listed with the "Buy Accessible Wizard" or supplying a URL to their VPAT must provide DIR with a report that addresses the same accessibility criteria in substantively the same format. Additional information regarding the "Buy Accessible Wizard" or obtaining a copy of the VPAT is located at <http://www.section508.gov/>.

11.32. Default

If Contractor is found to be in default under any provision of this Contract, *{Insert agency name here}* may cancel the Contract without notice and either re-solicit or award the contract to the next best responsive and responsible Respondent. In the event of abandonment or default, Contractor will be responsible for paying damages to *{Insert agency name here}* including but not limited to re-procurement costs, and any consequential damages to the State of Texas or *{Insert agency name here}* resulting from Contractor's non-performance. The defaulting Contractor will not be considered in the re-solicitation and may not be considered in future solicitations for the same type of work, unless the specification or scope of work is significantly changed.

11.33. Note to Respondent

Any terms and conditions attached to the response will not be considered unless specifically referred to on this Request for Proposal and may result in disqualification of the response.

11.34. Prohibited Use of Appropriated or other Funds Under Control of State Agency; Lobbying

The Contractor represents and warrants that ordering entities' payments to the Contractor and Contractor's receipt of appropriated or other funds under any of this or any resulting agreement are not prohibited by Government Code §556.005 or §556.008.

XII. Signatories

The undersigned signatories represent and warrant that they have full authority to enter into this Contract on behalf of the respective parties.

XIII. Merger

This Contract contains the entire agreement between Contractor and *{Insert agency name here}* and supersedes any prior understandings or oral or written agreements between *{Insert agency name here}* and Contractor on the matters contained herein. No modification, alteration, or waiver of any term, covenant, or condition of this Contract and any attachments shall be valid unless in writing and executed by *{Insert agency name here}* and Contractor.

By: _____

Jane Doe,

{Title of Appropriate Official}, {Insert agency name here}

Date: _____

By: _____

Name: _____

Title: _____

Date: _____

Approved as to Form:

Janet Doe, *{Appropriate Title for Attorney}, {Insert agency name here}*

Date: _____

EXHIBIT A OF CONTRACT NO. _____

Statement of Work

Signatures:

- _____
- *{Insert agency name here}*
- _____
- **Date:**_____

- _____
- _____
- _____
- **Date:**_____

EXHIBIT B OF CONTRACT NO. _____
RFP

The attached true and correct copy of *{Insert agency name here}*'s Request for Proposal is incorporated into Contract No. _____.

Signatures:

- _____
- *{Insert agency name here}*
- _____
- **Date:** _____

- _____
- _____
- _____
- **Date:** _____

EXHIBIT C OF CONTRACT NO. _____

AUTHORIZED KEY PERSONNEL

This Exhibit C is incorporated into this Contract.

Authorized Key Personnel:

Name	Title

Signatures:

- _____
- *{Insert agency name here}*
- _____
- **Date:**_____

- _____
- _____
- _____
- **Date:**_____

EXHIBIT D OF CONTRACT NO. _____

Contractor's Proposal and Contractor's Best and Final Offer

The attached true and correct copy of Contractor's Proposal and Contractor's Best and Final Offer is incorporated into Contract No.

Signatures:

- _____
- *{Insert agency name here}*
- _____
- **Date:** _____

- _____
- _____
- _____
- **Date:** _____

Date: _____

Date: _____

Reviewed:

Janet Doe, General Counsel, *{Insert agency name here}*

Date: _____

EXHIBIT A to RFP No. _____

HUB SUBCONTRACTING PLAN



HUB SUBCONTRACTING PLAN (HSP)

In accordance with Government Code §2161.252, the contracting agency has determined that subcontracting opportunities are probable under this contract. Therefore, respondents, including State of Texas certified Historically Underutilized Businesses (HUBs), must complete and submit a State of Texas HUB Subcontracting Plan (HSP) with their solicitation response.

NOTE: Responses that do not include a completed HSP shall be rejected pursuant to *Government Code §2161.252(b)*.

The HUB Program promotes equal business opportunities for economically disadvantaged persons to contract with the State of Texas in accordance with the goals specified in the State of Texas Disparity Study. The HUB goals defined in 1 TAC §20.13 are: **11.9 percent for heavy construction other than building contracts, 26.1 percent for all building construction, including general contractors and operative builders contracts, 57.2 percent for all special trade construction contracts, 20 percent for professional services contracts, 33 percent for all other services contracts, and 12.6 percent for commodities contracts.**

- - Agency Special Instructions/Additional Requirements - -

SECTION 1

- RESPONDENT AND SOLICITATION INFORMATION

- a. Respondent (Company) Name: _____ State of Texas VID #: _____
Point of Contact: _____ Phone #: _____
- b. Is your company a State of Texas certified HUB? ☐ - Yes ☐ - No
- c. Solicitation #: _____

SECTION 2

- SUBCONTRACTING INTENTIONS

After having divided the contract work into reasonable lots or portions to the extent consistent with prudent industry practices, the respondent must determine what portion(s) of work, including goods or services, will be subcontracted. Note: In accordance with 1 TAC §20.12., a "Subcontractor" means a person who contracts with a vendor to work, to supply commodities, or contribute toward completing work for a governmental entity. Check the appropriate box that identifies your subcontracting intentions:

- ☐ - Yes, I will be subcontracting portion(s) of the contract.
(If Yes, in the spaces provided below, list the portions of work you will be subcontracting, and go to page 2.)
- ☐ - No, I will not be subcontracting any portion of the contract, and will be fulfilling the entire contract with my own resources.
(If No, complete SECTION 9 and 10.)

Line Item # - Subcontracting Opportunity Description	Line Item # - Subcontracting Opportunity Description
(#1) -	(#11) -
(#2) -	(#12) -
(#3) -	(#13) -
(#4) -	(#14) -
(#5) -	(#15) -
(#6) -	(#16) -
(#7) -	(#17) -
(#8) -	(#18) -
(#9) -	(#19) -
(#10) -	(#20) -

*If you have more than twenty subcontracting opportunities, a continuation page is available at <http://www.cpa.state.tx.us/procurement/prog/hub/hub-forms/HUBSubcontractingPlanContinuationPage1.doc>

Enter your company's name here: _____ Solicitation #: _____

IMPORTANT: You must complete a copy of this page for each of the subcontracting opportunities you listed in SECTION 2. You may photocopy this page or download copies at http://www.window.state.tx.us/procurement/prog/hub/hub-forms/hsp_sep06_cont2.doc.

SECTION 3

- SUBCONTRACTING OPPORTUNITY

Enter the line item number and description of the subcontracting opportunity you listed in SECTION 2.

Line Item # _____ Description: _____

SECTION 4

- MENTOR-PROTÉGÉ PROGRAM

If respondent is participating as a Mentor in a State of Texas Mentor Protégé Program, submitting their Protégé (Protégé must be a State of Texas certified HUB) as a subcontractor to perform the portion of work (subcontracting opportunity) listed in SECTION 3, constitutes a good faith effort towards that specific portion of work. Will you be subcontracting the portion of work listed in SECTION 3 to your Protégé?

☐ - Yes (If Yes, complete SECTION 8 and 10.) ☐ - No / Not Applicable (If No or Not Applicable, go to SECTION 5.)

SECTION 5

- PROFESSIONAL SERVICES CONTRACTS ONLY

This section applies to Professional Services Contracts only. All other contracts go to SECTION 6.

Does your HSP contain subcontracting of 20% or more with HUB(s)?

☐ - Yes (If Yes, complete SECTION 8 and 10.) ☐ - No / Not Applicable (If No or Not Applicable, go to SECTION 6.)

In accordance with Government Code §2254.004, "Professional Services" means services: (A) within the scope of the practice, as defined by state law of accounting; architecture; landscape architecture; land surveying; medicine; optometry; professional engineering; real estate appraising; or professional nursing; or (B) provided in connection with the professional employment or practice of a person who is licensed or registered as a certified public accountant; an architect; a landscape architect; a land surveyor; a physician, including a surgeon; an optometrist; a professional engineer; a state certified or state licensed real estate appraiser; or a registered nurse.

SECTION 6

- NOTIFICATION OF SUBCONTRACTING OPPORTUNITY

Complying with a, b and c of this section constitutes Good Faith Effort towards the portion of work listed in SECTION 3. After performing the requirements of this section, complete SECTION 7, 8 and 10.

- Provide written notification of the subcontracting opportunity listed in SECTION 3 to **three (3)** or more HUBs. Use the State of Texas' Centralized Master Bidders List (CMBL), found at <http://www2.cpa.state.tx.us/cmb/cmb/hub.html>, and its HUB Directory, found at <http://www2.cpa.state.tx.us/cmb/hubonly.html>, to identify available HUBs. **Note:** Attach supporting documentation (letters, phone logs, fax transmittals, electronic mail, etc.) demonstrating evidence of the good faith effort performed.
- Provide written notification of the subcontracting opportunity listed in SECTION 3 to a minority or women trade organization or development center to assist in identifying potential HUBs by disseminating the subcontracting opportunity to their members/participants. A list of trade organizations and development centers may be accessed at <http://www.cpa.state.tx.us/procurement/prog/hub/mwb-links-1/>. **Note:** Attach supporting documentation (letters, phone logs, fax transmittals, electronic mail, etc.) demonstrating evidence of the good faith effort performed.
- Written notifications should include the scope of the work, information regarding the location to review plans and specifications, bonding and insurance requirements, required qualifications, and identify a contact person. Unless the contracting agency has specified a different time period, you must allow the HUBs no less than **five (5) working days** from their receipt of notice to respond, **and** provide notice of your subcontracting opportunity to a minority or women trade organization or development center no less than **five (5) working days** prior to the submission of your response to the contracting agency.

SECTION 7

- HUB FIRMS CONTACTED FOR SUBCONTRACTING OPPORTUNITY

List **three (3)** State of Texas certified HUBs you notified regarding the portion of work (subcontracting opportunity) listed in SECTION 3. Specify the vendor ID number, date you provided notice, and if you received a response. **Note:** Attach supporting documentation (letters, phone logs, fax transmittals, electronic mail, etc.) demonstrating evidence of the good faith effort performed.

Company Name	VID #	Notice Date (mm/dd/yyyy)	Was Response Received?
_____	_____	____/____/____	<input type="checkbox"/> - Yes <input type="checkbox"/> - No
_____	_____	____/____/____	<input type="checkbox"/> - Yes <input type="checkbox"/> - No
_____	_____	____/____/____	<input type="checkbox"/> - Yes <input type="checkbox"/> - No

SECTION 8

- SUBCONTRACTOR SELECTION

List the subcontractor(s) you selected to perform the portion of work (subcontracting opportunity) listed in SECTION 3. Also, specify the expected percentage of work to be subcontracted, the approximate dollar value of the work to be subcontracted, and indicate if the company is a Texas certified HUB.

Company Name	VID #	Expected % of Contract	Approximate Dollar Amount	Texas Certified HUB?
_____	_____	%	\$	<input type="checkbox"/> - Yes <input type="checkbox"/> - No*
_____	_____	%	\$	<input type="checkbox"/> - Yes <input type="checkbox"/> - No*

*If the subcontractor(s) you selected is not a Texas certified HUB, provide written justification of your selection process below:

Enter your company's name here: _____

Solicitation #: _____

SECTION 9

- SELF PERFORMANCE JUSTIFICATION

(If you responded "No" to SECTION 2, you must complete SECTION 9 and 10.)

Does your response/proposal contain an explanation demonstrating how your company will fulfill the entire contract with its own resources?

- ☐ - Yes If Yes, in the space provided below, list the specific page/section of your proposal which identifies how your company will perform the entire contract with its own equipment, supplies, materials and/or employees.
- ☐ - No If No, in the space provided below, explain how your company will perform the entire contract with its own equipment, supplies, materials, and/or employees.

SECTION 10

- AFFIRMATION

As evidenced by my signature below, I affirm that I am an authorized representative of the respondent listed in SECTION 1, and that the information and supporting documentation submitted with the HSP are true and correct. Respondent understands and agrees that, if awarded any portion of the solicitation:

- The respondent must submit monthly compliance reports (Prime Contractor Progress Assessment Report – PAR) to the contracting agency, verifying their compliance with the HSP, including the use/expenditures they have made to subcontractors. (The PAR is available at <http://www.cpa.state.tx.us/procurement/prog/hub/hub-forms/ProgressAssessmentReportForm09-07.xls>).
- The respondent must seek approval from the contracting agency prior to making any modifications to their HSP. If the HSP is modified without the contracting agency's prior approval, respondent may be subject to debarment pursuant to *Government Code* §2161.253(d).
- The respondent must, upon request, allow the contracting agency to perform on-site reviews of the company's headquarters and/or work-site where services are to be performed and must provide documents regarding staff and other resources.

Signature Printed Name



EXHIBIT B

EXECUTION OF PROPOSAL **RFP #303-FY-REQ. No. _____**

NOTE: THIS EXHIBIT MUST BE SIGNED AND RETURNED WITH THE PROPOSAL. PROPOSALS THAT DO NOT INCLUDE THIS EXHIBIT WILL BE DISQUALIFIED. THE PROPOSAL SHALL BE VOID IF FALSE STATEMENTS ARE CONTAINED IN THIS EXHIBIT.

By signature hereon, Respondent certifies that:

All statements and information prepared and submitted in the response to this RFP are current, complete, and accurate.

Respondent has not given, offered to give, nor intends to give at anytime hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted response.

Neither Respondent nor the firm, corporation, partnership, or institution represented by Respondent or anyone acting for such firm, corporation, or institution has (1) violated the antitrust laws of the State of Texas under Texas Business & Commerce Code, Chapter 15, or the federal antitrust laws; or (2) communicated the contents of this Proposal either directly or indirectly to any competitor or any other person engaged in the same line of business during the procurement process for this RFP.

When a Texas business address shown hereon that address is, in fact, the legal business address of Respondent and Respondent qualifies as a Texas Resident Bidder under 1 TAC § 111.2.

Under Government Code § 2155.004, no person who prepared the specifications or this RFP has any financial interest in Respondent's Proposal. If Respondent is not eligible, then any contract resulting from this RFP shall be immediately terminated. Furthermore, "under Section 2155.004, Government Code, the vendor [Respondent] certifies that the individual or business entity named in this bid or contract is not ineligible to receive the specified contract and acknowledges that this contract may be terminated and payment withheld if this certification is inaccurate."

Under Family Code § 231.006, relating to child support obligations, Respondent and any other individual or business entity named in this solicitation are eligible to receive the specified payment and acknowledge that this contract may be terminated and payment withheld if this certification is inaccurate.

Any Proposal submitted under this RFP shall contain the names and social security numbers of person or entity holding at least a twenty-five percent (25%) ownership interest in the business entity submitting the Proposal.

Name:	Social Security Number:
Name:	Social Security Number:
Name:	Social Security Number:

Under Government Code § 669.003, relating to contracting with an executive of a state agency, Respondent represents that no person who, in the past four years, served as an executive of the {Insert agency name here}) or any other state agency, was involved with or has any interest in this Proposal or any contract resulting from this RFP. If Respondent employs or has used the services of a former executive head of {Insert agency name here} or other state agency, then Respondent shall provide the following information: Name of former executive, name of state agency, date of separation from state agency, position with Respondent, and date of employment with Respondent.

Respondent agrees that any payments due under this contract will be applied towards any debt, including but not limited to delinquent taxes and child support that is owed to the State of Texas.

{Insert agency name here} is federally mandated to adhere to the directions provided in the President's Executive Order (EO) 13224, Executive Order on Terrorist Financing – Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism, effective 9/24/2001 and any subsequent changes made to it via cross-referencing respondents/vendors with the Federal General Services Administration's Excluded Parties List System (EPLS), <http://www.epls.gov>, which is inclusive of the United States Treasury's Office of Foreign Assets Control (OFAC) Specially Designated National (SDN) list.

Respondent certifies that the responding entity and its principals are eligible to participate in this transaction and have not been subjected to suspension, debarment, or similar ineligibility determined by any federal, state or local governmental entity and that Respondent is in compliance with the State of Texas statutes and rules relating to procurement and that Respondent is not listed on the federal government's terrorism watch list as described in Executive Order 13224. Entities ineligible for federal procurement are listed at <http://www.epls.gov>.

Under Section 2155.006(b) of the Texas Government Code, a state agency may not accept a bid or award a contract, including a contract for which purchasing authority is delegated to a state agency, that includes proposed financial participation by a person who, during the five-year period preceding the date of the bid or award, has been: (1) convicted of violating a federal law in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricane Rita, as defined by Section 39.459, Utilities Code, Hurricane Katrina, or any other disaster occurring after September 24, 2005; or (2) assessed a penalty in a federal civil or administrative enforcement action in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricane Rita, as defined by Section 39.459, Utilities Code, Hurricane Katrina, or any other disaster occurring after September 24, 2005. Under Section 2155.006 of the Texas Government Code, the bidder certifies that the individual or business entity named in this bid is not ineligible to receive the specified contract and acknowledges that any contract resulting from this IFB may be terminated and payment withheld if this certification is inaccurate.

Pursuant to Section 2262.003 of the Texas Government Code, the state auditor may conduct an audit or investigation of the vendor or any other entity or person receiving funds from the state directly under this contract or indirectly through a subcontract under this contract. The acceptance of funds by the Respondent or any other entity or person directly under this contract or indirectly through a subcontract under this contract acts as acceptance of the

authority of the state auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. Under the direction of the legislative audit committee, the Respondent or other entity that is the subject of an audit or investigation by the state auditor must provide the state auditor with access to any information the state auditor considers relevant to the investigation or audit. Respondent will ensure that this clause concerning the authority to audit funds received indirectly by subcontractors through the vendor and the requirement to cooperate is included in any subcontract it awards.

PREFERENCES

See Section 2.38 of the State of Texas Procurement Manual regarding preferences.

Check below to claim a preference under 34 TAC Rule 20.38

- () Supplies, materials or equipment produced in TX or offered by TX bidder or TX bidder that is owned by a service-disabled veteran *
- () Agricultural products produced or grown in TX
- () Agricultural products and services offered by TX bidders*
- () USA produced supplies, materials or equipment
- () Products of persons with mental or physical disabilities
- () Products made of recycled, remanufactured, or environmentally sensitive materials including recycled steel
- () Energy Efficient Products
- () Rubberized asphalt paving material
- () Recycled motor oil and lubricants
- () Products produced at facilities located on formerly contaminated property
- () Products and services from economically depressed or blighted areas
- () Vendors that meet or exceed air quality standards
- () Recycled or Reused Computer Equipment of Other Manufacturers
- () Foods of Higher Nutritional Value

RESPONDENT (COMPANY): _____

SIGNATURE (INK): _____

NAME (TYPED/PRINTED) _____

TITLE: _____ **DATE:** _____

STREET: _____

CITY/STATE/ZIP: _____

TELEPHONE AND FACSIMILE NUMBERS: _____

TEXAS IDENTIFICATION NUMBER (TIN): _____

Exhibit C to RFP No. 303-FY- _____

Compensation and Fees

Appendix 2

<Agency Name>

Solicitation Announcement

Date: < >

[Bid/Proposal] No.: < >

Class < > Item < >

The <AGENCY NAME> will be soliciting **[Invitation for Bids/Request for Proposals]** in the near future for <enter commodity or service description>. <service location(s)>.

[Bid/Proposal] forms and specifications for this **[commodity/service]** will be furnished to any company desiring to submit a **[bid/proposal]**. To request a solicitation package, please fill out the information below and return to the address or fax number indicated. To ensure that you receive the solicitation package in a timely manner, **PLEASE RETURN THIS REQUEST BY <DATE>**.

Vendor ID No.:	
Company Name:	
Company Address: (include city,state,zip)	
Point-of-Contact:	
Telephone No.:	
Fax No.:	

Return completed form by mail to:

<AGENCY NAME
ADDRESS
POINT OF CONTACT>

Or you may fax completed form to: <POINT OF CONTACT> at <FAX NUMBER>

NOTE: IF YOU FAX A REQUEST, DO NOT INCLUDE A COVER SHEET AND DO NOT MAIL ORIGINAL.

If you received this announcement for a class and item which does not pertain to your business, please modify your existing CMBL profile by following the steps at <http://www.window.state.tx.us/procurement/prog/cmb1/>. For general questions regarding the CMBL, reference the contact information available at the bottom of the above website page.

Appendix 3

Pre-Solicitation Conference Guidelines

Objective: A pre-solicitation conference is sometimes required to clarify specifications. It may be essential for potential bidders to visit the site prior to submitting a bid. Typically, the program staff, in conjunction with the Purchasing Department, determines if a pre-solicitation conference is necessary. If a pre-solicitation conference is necessary, the solicitation document must include:

- ☐ Exact physical location, including room number.
- ☐ Date and time of conference. The date must allow sufficient time for bidders to receive and review the solicitation prior to the conference. Typically, this is 7-10 days after the solicitation is published.

If the conference is mandatory, the following statement must be included in the solicitation. "Failure to attend the pre-bid conference will result in disqualification of the solicitation."

Typically, the purchaser conducts the conference. The purchaser provides:

- ☐ A recording device (optional)
- ☐ A sign-in sheet for attendees
- ☐ Additional copies of the solicitation

The conference begins as follows:

- ☐ Purchaser's opening remarks such as the purpose of the conference, requisition number and title of the procurement.
- ☐ Announce conference is being recorded, if applicable. Advise attendees to turn off or turn to vibrate any cell phones or pagers.
- ☐ Remind everyone to sign in, especially for mandatory conferences.
- ☐ Introduce agency representatives.
- ☐ Introduce attendee's. (optional depending on number attending conference)
- ☐ Review solicitation by section or page and ask for questions regarding each section and/or page. (Do not read the RFP word for word – summarize and allow for questions)
- ☐ Take notes of any addendum items or significant discussions.
- ☐ Site inspections may be conducted prior to or after the solicitation review, depending on the circumstances, but prior to close of the conference. After site inspections all attendee's should return to conference room to ask any questions as a result of the site inspection.
- ☐ Recap – Discuss and confirm the items to be included in addendum, if any. Remind attendees that oral changes are not official until they are included in an addendum.
- ☐ Collect sign-in sheets. Note: Usually attendees want copies of the sign-in sheets. If possible, make copies for attendees prior to the end of the conference.

After the conference:

- ☐ Keep recorded conference minutes in the contract file as official documentation of the meeting. The minutes may or may not be transcribed.
- ☐ Purchaser prepares addendum with input from the program staff. Program staff will review for accuracy prior to mailing.
- ☐ Purchaser will determine if there is sufficient time until bid opening or if bid date should be extended.
- ☐ Mail or fax addendum to attendees if needed.
- ☐ Send copy of addendum to program staff. If architectural or engineering plans are involved, advise program staff to provide a copy to the Architect or Engineer so they can provide copies to the plan rooms.
- ☐ Post addendum on the Electronic State Business Daily.

Appendix 4

Administrative Review Checklist

[Solicitation No.]

[Solicitation Title]

[Vendor Name]

	<u>Yes</u>	<u>No</u>
1. Execution of Proposal – Signed	<input type="checkbox"/>	<input type="checkbox"/>
2. HUB Subcontracting Plan	<input type="checkbox"/>	<input type="checkbox"/>
3. Submitted original and required # of copies	<input type="checkbox"/>	<input type="checkbox"/>
4. Addenda Acknowledged	<input type="checkbox"/>	<input type="checkbox"/>
5. Mandatory Pre-Bid Conference Attendance (if applicable)	<input type="checkbox"/>	<input type="checkbox"/>
6. Proposal Content		
Company Information	<input type="checkbox"/>	<input type="checkbox"/>
Experience and Qualifications	<input type="checkbox"/>	<input type="checkbox"/>
Compensation and Fees	<input type="checkbox"/>	<input type="checkbox"/>
References	<input type="checkbox"/>	<input type="checkbox"/>
Licenses/Certificate	<input type="checkbox"/>	<input type="checkbox"/>

	<u>Yes</u>	<u>No</u>
SOLICITATION RESPONSIVE	<input type="checkbox"/>	<input type="checkbox"/>

Appendix 5

Evaluation Team Guidelines

Purchaser Responsibilities

Note: This procedure is provided for use as a general guideline for agencies use and may be customized to meet individual agency needs. Agencies should determine their own internal policies and procedures in regard to evaluation teams.

Prior to the Evaluation Team meeting:

- ☐ Establish date and time for the team to meet. This should be done within one (1) week of publishing bids. Reserve adequate size conference room or ensure that program has done so. Review responses to ensure all responses are responsive (meet minimum requirements and provide all required information).
- ☐ Prepare sufficient copies of the technical evaluation matrix for each team member (depending on the number of responses received).
- ☐ Assemble copies of all responses for each team member. Remove pricing information as the scores for pricing are calculated by the Purchasing Department and are not typically provided to the evaluators.

Evaluation Team Meeting:

- ☐ Hand out evaluation packages to each member. Package includes:
 - Evaluation Team Briefing document (see attached).
 - Copy of the RFP and any addenda. Members should already be familiar with these documents prior to the meeting.
 - Copy of all responsive proposals received.
 - Evaluation Matrix (appropriate number of copies – depending on the number of responses received).
 - Non-Disclosure Statement (2 copies for each member)
 - Pencils
- ☐ Review briefing document with team. (see attached)
- ☐ Collect signed non-disclosure statements. Team members each keep a copy for their records and as a reminder of their responsibilities.
- ☐ Review the evaluation matrix to ensure team understands how the matrix works and how the proposals will be evaluated. Explain the scoring process.
- ☐ Advise members that evaluations are subject to the Open Records Act and thus should be aware of information that is written on the matrix. However, it is helpful in the de-briefing process if the evaluators write in the comment section – especially if the score is unusually low or high. This allows respondents to know where their strengths and weaknesses are so they can improve on future proposals.
- ☐ Generally, a Purchasing Department representative (typically the purchaser) remains during the meeting to answer any questions which may arise and to ensure proper procedures are followed. Sometimes, due to time constraints, remote location of team members or other circumstances, it is not possible for all members to be together for the evaluation. However, this is the preferred method.
- ☐ Scores are not divulged between team members. Members may ask questions if they are unable to find information, do not understand information in a proposal or require the technical assistance of other members.
- ☐ After the technical evaluations are completed, all evaluation matrices are turned into the Purchasing Department.

After the Meeting:

- ☐ Technical scores are verified and calculated by the purchaser. Technical scores are added to the price score and the total scores are calculated.
- ☐ Recommendation for negotiations, discussions and/or award is determined by the evaluation team.
- ☐ Remind all team members that they should continue to refer any questions about the selection and award process to the Purchasing Department.

Appendix 6

Evaluation Team Briefing Instructions

RFP#
Briefing Date:

Non-voting Members

[Insert names of non-voting members – typically this is the purchaser].

Voting Members

[Insert names of voting members]

Member Responsibilities:

- ☐ Sign Non-Disclosure Forms. This form states that you will not divulge any information concerning this submittal/evaluation to anyone who is not a part of the team.
- ☐ Evaluate submittals independently and impartially.
- ☐ If a respondent/contractor contacts you, refer them to the purchaser.
- ☐ If a team member has questions on the submittal, submit in writing to the purchaser. The purchaser will contact the respondent, obtain an explanation and prepare a written response. All members will be provided a copy of the response.
- ☐ Please safeguard the submittal when not evaluating.
- ☐ Purchasing Department will score pricing and tabulate total scores.

Questions between team members are allowed, but team member should respond only with technical information. Do not give individual opinions about respondents and/or the content of their responses.

Be sure to put your name and the respondent name on each sheet.

Appendix 7

Non-Disclosure Statement

I, _____, the undersigned, hereby certify that the following statements are true and correct and that I understand and agree to be bound by the commitments contained herein.

I am acting at the request of the [**Agency Name**] as a participant in the [_____] procurement received in response to the Request for Proposal Number [_____].

I am acting of my own accord and am not acting under duress. I am not currently employed by, nor am I receiving any compensation from, nor have I been the recipient of any present or future economic opportunity, employment, gift, loan, gratuity, special discount, trip, favor, or service in connection with any submittal or involved respondent in return for favorable consideration. I have no preconceived position on the relative merits of any of the submittals nor have I established a personal preference or position on the worth or standing of any respondent participating in this action.

I agree not to disclose or otherwise divulge any information pertaining to the contents, status, or ranking of any submittals to anyone other than the evaluation team leader or other evaluation team members. I understand the terms "disclose or otherwise divulge" to include, but are not limited to, reproduction of any part or portion of any submittal, or removal of same from designated areas without prior authorization from the evaluation team leader. I agree to perform any and all evaluations of said submittals in an unbiased manner, to the best of my ability, and with the best interest of the State of Texas paramount in all decisions.

(Signature)

Printed Name

(Date)

Appendix 8

Reference Check Form

Vendor Name:

Reference Name:

Company Name:

Contact Number:

Introduction: Hello, my name is **[caller's name]** with **[agency name]**. We are currently evaluating vendor proposals for **[solicitation title]** and checking vendor references. Your name and number were provided to us as a reference for **[vendor name]**. Do you have a few minutes to answer some questions?

1. How long have you used this particular vendor in a consulting capacity?
2. How many different projects has this vendor been used on in a consulting capacity?
3. How many different consultants ...
 - a. Have you used in the past? Or
 - b. Are you currently using?
4. On a scale of one to ten, with ten being completely satisfied and one being completely unsatisfied, how would you rate the following:

	Rating
a. Overall vendor ability to provide articulate recommendations?	
b. Overall vendor ability to provide feasible and functional recommendations?	
c. Overall vendor reliability?	
d. Overall vendor ability to meet timelines or deadlines?	
e. Overall quality of vendor deliverables?	
f. Overall vendor personnel experience level?	

5. On a scale of one to ten, with ten being excellent and one being unsatisfactory, how would you rate the following: Rating

- a. The company's attitude toward customer service?
- b. The company's ability to resolve problems?
- c. The company's overall performance?

6. On a scale of one to ten, with ten being "absolutely would" and one being "absolutely would not," would you recommend this vendor to another agency or company?

Rating

7. In your opinion, what are the vendor's ...

- a. Strengths?
- b. Weaknesses?

8. Do you have any additional comments?

Total Rating

[Signature of person conducting reference checks]

Appendix 9

Contract Terms

Information about contract terms and examples of contract provisions are provided below. The agency's attorney should be involved in the development of contracts so that required contract terms and those drafted to achieve the agency's desired outcomes, are included in the contracts.

Administrative Terms

Terms related to the general administration of the contract are administrative terms. Examples of administrative terms may include, but are not limited to:

Introduction

Every contract should have introductory language that identifies the parties to the contract. This paragraph may also identify the general relationships between the parties. The contracting entity may be a corporation, non-profit corporation, limited liability partnership or professional corporation, partnership or sole proprietorship, or it may be an individual. Also, an entity may transact business using an assumed name. When referencing the name of the contractor, be certain to use the correct, complete name of the contractor. Also include any assumed name used by the entity such as: [correct legal name] doing business as or "DBA" [assumed name]. A business may have several addresses; sometimes an entity will have a Texas address and an out-of-state address, so include both addresses in the introduction. The following examples of introductory clauses are offered for illustration purposes only.

Example 1:

This Agreement is made and entered into by and between the *state agency*, hereinafter referred to as "state" whose principal place of business is located at 100 Congress, Suite 100, Austin, Texas 78701 and *Correct Corporate Name* doing business as *Assumed Name* hereinafter referred to as "contractor" whose principal place of business is located at 100 Contractor's Blvd, Suite 110, Austin, Texas 78744, with reference to the following facts:

Example 2:

This Agreement including all Exhibits and Schedules attached hereto and incorporated herein by reference (the "Agreement") is made as of the *date* day of *month* *year*, by and between *state agency* (the 'commission', a state agency having its principal offices at 100 Congress, Suite 100, Austin, Texas 78791, and *Correct Corporate Name* (the "Contractor"), a California corporation having its principal Texas offices at 100 Consultant Blvd, Suite 110, Austin, Texas 78744. Commission agrees to buy products and services from Contractor and Contractor agrees to provide or supply products and services to Commission, on the following terms and conditions specified herein.

Notice

It is good practice to designate who receives formal notices and the acceptable manner for the delivery of such notice in a contract. Examples of notice provisions include:

Delivery of Notices. Any notice required or permitted to be given under this contract by one party to the other party shall be in writing and shall be given and deemed to have been given

immediately if delivered in person to the recipient's address set forth in this section or on the date of certified receipt if placed in the United States mail, postage pre—paid by registered or certified mail with return receipt requested, addressed to the receiving party at the address hereinafter specified.

Contractor's Mailing Address. The mailing address of the Contractor for all purposes under this contract and for all notices hereunder will be:

State Agency's Mailing Address. The address of the *state agency* for all purposes under this contract and for all notices hereunder shall be sent by registered or certified mail with return receipt to:

It is a good practice to designate who receives formal notices and the acceptable manner for the delivery of such notice in a contract.

Scope of Work

Include the relevant portions of the scope of work from the solicitation document and include the contractor's response outlining the proposed scope of work.

Order of Precedence

In the event of conflicts or inconsistencies between this contract and its exhibits or attachments, such conflicts or inconsistencies shall be resolved by reference to the documents in the following order of priority: [list the order of precedence the agency wants applied to documents. For instance, contract, exhibits, RFO, response to RFO.]

The use of this clause is strongly encouraged as it can be extremely important when problems arise. Ensure that the information is correct and inclusive of all documents. The usual order of precedence is the contract, solicitation document, and contractor's proposal.

Term of Contract

Contract Term. This service shall be for a period of *[insert term]* years beginning on *[month, date, and year]* and ending on *[month, date, and year]*. Contract may be extended for an additional *[insert term]* year period, provided both parties agree in writing to do so, prior to the expiration date. Any extensions shall be at the same terms and conditions, plus any approved changes.

There are many variations regarding contract terms. The term should clearly state the duration of the contract. There is no statutory term limit on contracts. However, as mentioned in Chapter 3, as a general policy, it is recommended that the maximum contract period should not be longer than four years.

Contract renewals can only be made when a contract renewal clause is included in the contract. If the contract allows for a price increase, the conditions for requesting and receiving approval for an increase must be spelled out in the original contract. Typically, provisions for price increase use "a commonly accepted index named in the contract" or a "formula set forth in the contract."

Consideration/Price

Example 1 The contract price is \$25,000. [Fixed price]

Example 2 The State shall pay the contractor at the rates set herein for labor and/or material, not to exceed a maximum amount of \$25,000. The contractor shall successfully complete the services in accordance with contract requirements within the ceiling price specified herein. [Time and material/labor hours]

Example 3 The State shall reimburse the contractor's reasonable, allowable costs, as defined herein, not to exceed \$25,000. [Cost reimbursement]

Consideration should be stated as a definite amount at a certain rate with a total cost not to exceed.

Other Administrative Terms

Specifications

The services performed shall be in accordance with the purchase specifications herein. *Agency name* will determine the answers to all questions that may arise as to the interpretation of the specifications and the quality or acceptability of work performed. *Agency name* will decide the rate of progress of the work and the acceptable fulfillment of the service on the part of the contractor.

Funding

This contract is subject to cancellation, without penalty, either in whole or in part, if funds are not appropriated by the Texas Legislature.

Clause is essential when the contract term extends into the next biennium.

One possible approach:

Section [XX]: This Contract is subject to termination, either in whole or in part, without penalty to [name of agency], subject to appropriation or availability of state funds. The [name of agency] is a state agency whose authority and appropriations are subject to actions of the Texas Legislature and whose availability of funds may be subject to governmental action. If [name of agency] becomes subject to a legislative change, revocation of statutory authority, lack of appropriated funds, or unavailability of funds which would render contractor's delivery or performance under this Contract impossible or unnecessary, this Contract will be terminated, either in whole or in part. In the event of a termination under this Section, [name of agency] will not be liable to contractor or any other person or entity for any payments, damages or any other amounts which were otherwise due or which may be caused or associated with such termination and [name of agency] will not be required to give prior notice.

Alternative:

Section [XX]: [Name of agency] represents that it is a government agency or instrumentality of the State of Texas, and that [name of agency] has, as of the date of [name of agency's] execution of this Contract, obtained all requisite approvals and authority to enter into and perform its obligations under this Contract, including, without limitation, the obligation to make the initial payment or payments required to be made under this Contract on the date or dates upon which such initial payment or payments may otherwise become due during [name of agency's] current fiscal year [specify, such as: September 1, 2003 through August 31, 2004]. With respect to any subsequent payment which may be required to be made under this Contract in any subsequent fiscal year of [name of agency] during the Term of this Contract, the parties acknowledge that [name of agency's] authority to make such subsequent payments are contingent upon appropriation to [name of agency] by the Texas Legislature of funds sufficient for such purpose or may be otherwise be contingent on availability of funds to [name of agency] sufficient for such purpose. If such additional sufficient funds are not so appropriated to [name of agency] or are not available to [name of agency], this Contract shall terminate as of the first day of the applicable subsequent fiscal year of [name of agency] with respect to which such sufficient funds are either not appropriated or are not available; in the event of such termination under this Section, [name of agency] will not be liable to contractor for any damages or any other amounts which are caused or associated with such termination and [name of agency] will not be required to give prior notice. As to requests for appropriated funds for such subsequent fiscal years, [name of agency] (a) will not effect termination of appropriated funds for the purpose of replacing the Licensed Program(s) with an equivalent product or products supplied by others and (b) will use its reasonable efforts to request appropriation of such additional sufficient funds. Upon such termination, [name of agency] shall immediately cease all use of the Licensed Program and return to contractor all copies of the Licensed Program and all related documentation and continue to abide by the provisions of the License Agreement relating to the confidentiality thereof.

And either alternative coupled with:

Section [XX]: Applicable Law and Conforming Amendments: Contractor must comply with all laws, regulations, requirements and guidelines applicable to a catalogue vendor or other contractor providing the services and products under this Contract to the State of Texas, as these laws, regulations, requirements and guidelines currently exist and as amended throughout the term of this Contract. [State agency] reserves the right, in its sole discretion, to unilaterally amend this Contract throughout the term of the contract to incorporate any modifications necessary for the [the agency's compliance, as an agency of the State of Texas, with all applicable state and federal laws, regulations, requirements and guidelines.

Public Disclosure

Information, documentation and other material in connection with this contract may be subject to public disclosure pursuant to Chapter 552 of the Texas Government Code (the "Public Information Act"). Agencies may want to restrict publicity about the contract by the contractor without prior agency consent. The contract should prohibit any publicity that could be construed as an endorsement by the agency of the contractor or the products or services provided by the contractor pursuant to the contract.

Antitrust

Contractor represents and warrants that neither Contractor nor any firm, corporation, partnership, or institution represented by Contractor, or anyone acting for such firm, corporation or institution has, (1) violated the antitrust laws of the State of Texas under Tex. Bus. & Com. Code, Chapter 15, or the federal antitrust laws; or (2) communicated directly or indirectly the Proposal to any competitor or any other person engaged in such line of business during the procurement process for this Contract.

Payment

The form of any invoice submitted under this section must comply with the specifications of the *agency name* and must be submitted in the manner and with the documentation the *agency name* may require.

Payment will be made on a *[insert frequency]* basis and within thirty (30) days from receipt of a correct invoice or billing statement. Each invoice presented must include the *agency name's* contract number. The invoice must identify vendor identification number or social security number, a description of the services provided the name and division of the *agency name* contract manager. The invoices must be submitted to: *[insert state agency billing address]*. Payment will be made in accordance with the Texas Prompt Payment law, Texas Government Code, Subtitle F, Chapter 2251.

Dispute Resolution

The dispute resolution process provided for in Chapter 2260 of Texas Government Code shall be used by *agency name* and the contractor to resolve all disputes arising under this contract.

Chapter 2260 of the Texas Government Code ("Chapter 2260") prescribes dispute resolution processes for certain breach of contract claims applicable to certain contracts for goods and services. As required by Chapter 2260, Agency has adopted rules under Chapter 2260, codified at [Specific Agency Cite: Comptroller's is 34 Texas Administrative Code §§1.360 – 1.387], and may adopt revisions to these rules throughout the term of this Agreement, including any extensions. Contractor shall comply with such rules.

The dispute resolution process provided for in Chapter 2260 of the Government Code shall be used, as further described herein, by Agency and Contractor to attempt to resolve any claim for breach of contract made by Contractor under this Agreement:

(A) Contractor's claim for breach of this Agreement that the parties cannot resolve in the ordinary course of business shall be submitted to the negotiation process provided in Chapter 2260. To initiate the process, Contractor shall submit written notice, as required by Chapter 2260, to the Deputy Comptroller or his or her designee. Said notice shall also be given to all other representatives of Agency and Contractor otherwise entitled to notice under this Agreement. Compliance by Contractor with Chapter 2260 is a condition precedent to the filing of a contested case proceeding under Chapter 2260.

(B) The contested case process provided in Chapter 2260 is Contractor's sole and exclusive process for seeking a remedy for an alleged breach of contract by Agency if the parties are unable to resolve their disputes under subparagraph (A) of this Section.

(C) Compliance with the contested case process provided in Chapter 2260 is a condition precedent to seeking consent to sue from the Legislature under Chapter 107, Civ. Prac. and Rem. Code. Neither the execution of this Agreement by Agency nor any other conduct of any representative of Agency relating to this Agreement shall be considered a waiver of sovereign immunity to suit.

For all other specific breach of contract claims or disputes under this Agreement, the following shall apply:

Should a dispute arise out of this Agreement, Agency and Contractor shall first attempt to resolve it through direct discussions in a spirit of mutual cooperation. If the parties' attempts to resolve their disagreements through negotiations fail, the dispute will be mediated by a mutually acceptable third party to be chosen by Agency and Contractor within fifteen (15) days after written notice by one of them demanding mediation under this Section. Contractor shall pay all costs of the mediation unless Agency, in its sole good faith discretion, approves its payment of all or part of such costs. By mutual agreement, Agency and Contractor may use a non-binding form of dispute resolution other than mediation. The purpose of this Section is to reasonably ensure that Agency and Contractor shall in good faith utilize mediation or another non-binding dispute resolution process before pursuing litigation. Agency's participation in or the results of any mediation or another non-binding dispute resolution process under this Section or the provisions of this Section shall not be construed as a waiver by Agency of (1) any rights, privileges, defenses, remedies or immunities available to Agency as an agency of the State of Texas or otherwise available to Agency; (2) Agency's termination rights; or (3) other termination provisions or expiration dates of this Agreement.

Agencies may have their own process for mediating contract disputes and the process can be modified as long as it does not conflict with statute. Not all contracts will require a mediation clause.
--

Intellectual Property Indemnification

The contractor will indemnify, defend and hold harmless the State of Texas and (*agency name*) against any action or claim brought against the State of Texas and/or (*agency name*) that is based on a claim that software infringes any patent rights, copyright rights or incorporated misappropriated trade secrets. Contractor will pay any damages attributable to such claim that are awarded against the State of Texas and/or (*agency name*) in a judgment or settlement.

If (*agency name*)'s use of the software becomes subject to a claim, or is likely to become subject to a claim, in the sole opinion of (*agency name*) contractor shall, at its sole expense (1) procure for (*agency name*) the right to continue using such software under the terms of this Contract; or (2) replace or modify the software so that it is non-infringing.

Contractor Responsibilities

Contractor shall comply with all federal, state and local laws, statutes, ordinances, rules and regulations and the orders and decrees of any court or administrative bodies or tribunals in any matter affecting the performance of this agreement, including, if applicable, workers, compensation laws, compensation statutes and regulations, and licensing laws and regulations. When required, contractor shall furnish *agency name* with satisfactory proof of its compliance.

The contractor shall be responsible for damage to *agency name's* equipment, and/or the workplace and its contents, by its, or its contractors' work, negligence in work, personnel, and equipment. The contractor shall be responsible and liable for the safety, injury and health of its employees and contractors while they are performing work for *agency name* under this Contract.

The contractor shall provide all labor and equipment necessary to furnish the goods or perform the service. All employees of the vendor shall be a minimum of 17 years of age and experienced in the type of work to be performed. No visitors or relatives of the contractor's employees and contractors will be allowed on state property unless they are bona fide employees or contractors of the contractor performing work under this Contract.

Assignment

The contractor shall not assign or subcontract the whole or any part of the contract without *agency name's* prior written consent. The Contractor may assign its right to receive payment to such third parties as the contractor may desire without the prior written consent of the state, provided that contractor gives written notice (including evidence of such assignment) to the state thirty (30) days in advance of any payment so assigned. The assignment shall cover all unpaid amounts under this contract and shall not be made to more than one party.

Indemnification

CONTRACTOR SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS THE STATE OF TEXAS, ITS OFFICERS, AND EMPLOYEES, AND [NAME OF AGENCY], ITS OFFICERS, AND EMPLOYEES AND CONTRACTORS, FROM AND AGAINST ALL CLAIMS, ACTIONS, SUITS, DEMANDS, PROCEEDINGS, COSTS, DAMAGES, AND LIABILITIES, INCLUDING WITHOUT LIMITATION ATTORNEYS' FEES AND COURT COSTS, ARISING OUT OF, CONNECTED WITH, OR RESULTING FROM ANY ACTS OR OMISSIONS OF CONTRACTOR OR ANY AGENT, EMPLOYEE, SUBCONTRACTOR, OR SUPPLIER OF CONTRACTOR IN THE EXECUTION OR PERFORMANCE OF THIS CONTRACT. CONTRACTOR SHALL COORDINATE ITS DEFENSE WITH THE TEXAS ATTORNEY GENERAL AS REQUESTED BY [NAME OF AGENCY].

THIS PARAGRAPH IS NOT INTENDED TO AND SHALL NOT BE CONSTRUED TO REQUIRE CONTRACTOR TO INDEMNIFY OR HOLD HARMLESS THE STATE OR [NAME OF AGENCY] FOR ANY CLAIMS OR LIABILITIES RESULTING FROM THE NEGLIGENT ACTS OR OMISSIONS OF [NAME OF AGENCY] OR ITS EMPLOYEES.

Insurance

The Contractor shall procure and maintain at its expense during the term of the contract or any extensions thereof, insurance as listed below. Insurance shall be written by companies acceptable to (*name of agency*) and authorized to do business in the State of Texas. Policies shall include terms and provisions indicated below. The Contractor shall provide and furnish evidence of the following insurance:

Workers Compensation – Minimum coverage for employer liability as determined by the Texas Department of Insurance.

Contractor shall obtain and maintain in full force at all times during the term of this contract insurance coverage naming the State of Texas, acting through the *agency name*, as an additional insured and loss payee on its policies described below.

Comprehensive General Liability in the amount of: [insert amount appropriate for the specific purchase] per occurrence and of [insert amount appropriate for the specific purchase] in the aggregate.

Business Automobile Liability Insurance for all owned, non-owned and hired vehicles with a minimum combined limit of: [insert amount appropriate for the specific purchase] per occurrence for bodily injury and property damage.

If insurance policies are not written for amounts specified above, Contractor shall carry Umbrella or Excess Liability Insurance for any differences in amounts specified. If Excess Liability insurance is provided, it shall follow the form of the primary coverage.

Professional Liability Insurance with the limits of: [insert amount appropriate for the specific purchase] per claim. [This type of insurance is only necessary for required for specific types of services wherein the actions directed or recommended by professionals may put the agency at risk.^{bxxxii}]

Each policy of required insurance shall provide for ten (10) days written notice of cancellation to (name of agency) and include the following provisions. "It is a condition of this policy that the Company shall furnish written notice to *agency name and address* ten (10) days in advance of any reduction in, or cancellation of this policy."

Insurance shall be effective and evidence of acceptable insurance furnished to *agency name*, prior to commencing any operations under this contract.

The amount and type of insurance may change depending on the type and subject of the solicitation. Agencies should refer to their legal department for direction on the type and amount of insurance coverage requirements. Director or officer liability insurance coverage may also be required to protect the state's interests as per §2261.102, Government Code.

Abandonment or Default

If the contractor defaults on the contract, *agency name* reserves the right to cancel the contract without notice and either re-solicit or re-award the contract to the next best responsive and responsible respondent. The defaulting contractor will not be considered in the re-solicitation and may not be considered in future solicitations for the same type of work, unless the specification or scope of work significantly changed. The period of suspension will be determined by the agency based on the seriousness of the default.

In accordance with §2261.101, Government Code Remedies and Sanctions^{bxxxiii} – agencies shall incorporate language which shall hold contractors accountable for breach of contract or substandard performance without unfairly limiting competition.

Right to Audit

Contractor understands that acceptance of funds under this contract acts as acceptance of the authority of the State Auditor's Office, *agency name* or any successor agency, to conduct an audit or investigation in connection with those funds. Contractor further agrees to cooperate fully with the above parties in the conduct of the audit or investigation, including providing all records requested. Contractor shall ensure that this clause concerning the authority to audit funds received indirectly by subcontractors through the contractor and the requirement to cooperate is included in any subcontract it awards.

Contractor shall maintain and retain supporting fiscal documents adequate to ensure that claims for contract funds are in accordance with applicable Agency and State of Texas requirements. Contractor shall maintain all such documents and other records relating to this Agreement and the State's property for a period of four (4) years after the date of submission of the final invoices or until a resolution of all billing questions, whichever is later. Contractor shall make available at reasonable times and upon reasonable notice, and for reasonable periods, all information related to the State's property, such as work papers, reports, books, data, files, software, records, and other supporting documents pertaining to this Agreement, for purposes of inspecting, monitoring, auditing, or evaluating by Agency, the State of Texas or their authorized representatives. Contractor shall cooperate with auditors and other authorized Agency and State of Texas representatives and shall provide them with prompt access to all of such State's property as requested by Agency or the State of Texas. By example and not as an exclusion to other breaches or failures, Contractor's failure to comply with this Section shall constitute a material breach of this Agreement and shall authorize Agency to immediately assess the liquidated damages for such failure. For purposes of this Section, the "State's property" includes, but is not limited to, "Work" as defined in the RFP. Agency may require, at Contractor's sole cost and expense, independent audits by a qualified certified public accounting firm of Contractor's books and records or the State's property. The independent auditor shall provide Agency with a copy of such audit at the same time it is provided to Contractor. Agency retains the right to issue a request for proposals for the services of an independent certified public accounting firm under this Agreement. In addition to and without limitation on the other audit provisions of this Agreement, pursuant to Section 2262.003, Tex Government Code, the State Auditor may conduct an audit or investigation of the Contractor or any other entity or person receiving funds from the state directly under this Agreement or indirectly through a subcontract under this Agreement. The acceptance of funds by the Contractor or any other entity or person directly under this Agreement or indirectly through a subcontract under this Agreement acts as acceptance of the authority of the state auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. This Agreement may be amended unilaterally by the *agency name* to comply with any rules and procedures of the state auditor in the implementation and enforcement of Section 2262.003. Under procedures provided by the state auditor on September 5, 2003, in addition to the above, (1) the Contractor understands that the acceptance of funds under this Agreement acts as acceptance of the authority of the state auditor to conduct an audit or investigation in connection with those funds; (2) the Contractor further agrees to cooperate fully with the state auditor in the conduct of the audit or investigation, including providing all records requested; and (3) the Contractor shall ensure that this paragraph concerning the authority to audit funds received indirectly by subcontractors through the Contractor and the requirement to cooperate is included in any subcontract it awards.

In contracts involving federal funds, the right to audit provision of the contract includes the right for the cognizant federal agencies and the federal Office of Inspector General to audit.

Force Majeure

Agency name may grant relief from performance of the contract if the vendor is prevented from performance by an act of war, order of legal authority, act of God, or other unavoidable cause not attributable to the fault or negligence of the contractor. The burden of proof for the need of such relief shall rest upon the contractor. To obtain release based on force majeure, the contractor shall file a written request with *agency name*.

Proprietary or Confidential Information

Contractor will not disclose any information to which it is privy under this Contract without the prior consent of the agency. Contractor will indemnify and hold harmless the State of Texas, its officers and employees, and (*agency name*), its officers and employees for any claims or damages that arise from the disclosure by Contractor or its contractors of information held by the State of Texas.

Rights to Data, Documents and Computer Software (State Ownership)

Any software, research, reports studies, data, photographs, negatives or other documents, drawings or materials prepared by contractor in the performance of its obligations under this contract shall be the exclusive property of the State of Texas and all such materials shall be delivered to the State by the contractor upon completion, termination, or cancellation of this contract. Contractor may, at its own expense, keep copies of all its writings for its personal files. Contractor shall not use, willingly allow, or cause to have such materials used for any purpose other than the performance of contractor's obligations under this contract without the prior written consent of the State; provided, however, that contractor shall be allowed to use non-confidential materials for writing samples in pursuit of the work. The ownership rights described herein shall include, but not be limited to, the right to copy, publish, display, transfer, prepare derivative works, or otherwise use the works.

Not only may there be instances where the State does not wish the work products of the contractor to be made available to any other entity, public or private, but also the contractor is not entitled to any additional profit or benefit where payment for the said products was by public funds, unless the state agency has given its prior approval of the use of the materials.

This clause gives the "ownership" rights in all works, including software, developed or created under the contract. This allocation of rights would be equitable where all development was funded at state expense. If some development is funded at the expense of the contractor or commercially available software is part of the deliverable, then a modification to the clause is necessary to identify the license rights that exist to the software where the state does not have an ownership interest.

Independent Contractor

Both parties hereto, in the performance of this contract, shall act in an individual capacity and not as agents, employees, partners, joint ventures or associates of one another. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purposes whatsoever. The contractor shall be responsible for providing all necessary unemployment and workers' compensation insurance for the contractor's employees.

Vendor Performance

In accordance with Texas Government Code, §2155.074 and 2155.75, vendor performance may be used as a factor in the award.

Termination

This contract shall terminate upon full performance of all requirements contained in this contract, unless otherwise extended or renewed as provided in accordance with the contract terms and conditions.

Termination for Convenience. *Agency name* and contractor reserve the right to terminate the contract at any time for convenience, in whole or in part, by providing thirty (30) calendar days advance written notice (delivered by certified mail, return receipt requested) of intent to terminate. In the event of such a termination, the contractor shall, unless otherwise mutually agreed upon in writing, cease all work immediately upon the effective date of termination. *Agency name* shall be liable for payments limited only to the portion of work authorized by *agency name* in writing and completed prior to the effective date of cancellation, provided that *agency name* shall not be liable for any work performed that is not acceptable to *agency name* and/or does not meet contract requirements. All work products produced by the Contractor and paid for by *agency name* shall become the property of *agency name* and shall be tendered upon request.

[Before using the above provision, determine if the agency is willing to allow the contractor to terminate for convenience or if only the agency should be allowed to terminate for convenience.]

Termination for Default. *Agency name* may, by written notice of default to the contractor, terminate this contract, in whole or in part, for cause if the contractor fails to perform in full compliance with the contract requirements, through no fault of the *agency name*. *Agency name* will provide a thirty (30) day written notice of termination to the contractor (delivered by certified mail, return receipt requested) of intent to terminate, and *agency name* will provide the contractor with an opportunity for consultation with *agency name* prior to termination.

Upon receipt of written notice to terminate, the contractor shall promptly discontinue all services affected (unless the notice directs otherwise) and shall deliver or otherwise make available to *agency name*, all data, drawings, specifications, reports, estimates, summaries, and such other information and materials as may have been accumulated by the contractor in performing this contract, whether completed or in process.

Substitutions

Substitutions are not permitted without the written approval of *agency name*.

This clause is typically applicable to goods, however it can apply to some services. For example, when contracting for computer programmers, if the selection is made upon highly qualified personnel and then after award the contractor substitutes less qualified individuals, this can be a problem. For these types of service contracts, a provision should be added which requires substitution only with equally qualified personnel and prior agency approval.

Buy Texas

Contractor represents and warrants that it will buy Texas products and materials for use in providing the services authorized herein when such products and materials are available at a comparable price and in a comparable period of time when compared to non-Texas products and materials.^{lxixiv}

Taxes

Purchases made for state uses are exempt from Texas State Sales Tax and Federal Excise Tax. An Excise Tax Exemption Certificate will be furnished upon written request to *agency name*.

Public Disclosure

No public disclosures or news releases pertaining to this contract shall be made without prior written approval of *agency name*.

Electronic and Information Resources Accessibility Standards, As Required by 1 TAC Chapter 213 (Applicable to State Agency and Institution of Higher Education Purchases Only)

1) Effective September 1, 2006 state agencies and institutions of higher education shall procure products which comply with the State of Texas Accessibility requirements for Electronic and Information Resources specified in 1 TAC Chapter 213 when such products are available in the commercial marketplace or when such products are developed in response to a procurement solicitation.

2) Vendor shall provide DIR with the URL to its Voluntary Product Accessibility Template (VPAT) for reviewing compliance with the State of Texas Accessibility requirements (based on the federal standards established under Section 508 of the Rehabilitation Act), or indicate that the product/service accessibility information is available from the General Services Administration "Buy Accessible Wizard" (<http://www.buyaccessible.gov>). Vendors not listed with the "Buy Accessible Wizard" or supplying a URL to their VPAT must provide DIR with a report that addresses the same accessibility criteria in substantively the same format. Additional information regarding the "Buy Accessible Wizard" or obtaining a copy of the VPAT is located at <http://www.section508.gov/>.

Affirmation Clauses

These clauses are usually included in the Execution of Proposal (see Appendix 1) which is part of the solicitation document. If the solicitation document does not contain an Execution of Proposal, then these clauses should be included in the contract document. All of these provisions are not required for every type of contract. Agencies should evaluate each of the following provisions for applicability to individual procurements:

By signature hereon, the respondent certifies that:

All statements and information prepared and submitted in the response to this RFP are current, complete and accurate.

He/she has not given, offered to give, nor intends to give at anytime hereafter, any economic opportunity, future employment, gift, loan gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted response.^{xxxxv}

Failure to sign the Execution of Proposal or signing it with a false statement shall void the submitted offer or any resulting contracts.

Neither Respondent nor the firm, corporation, partnership, or institution represented by Respondent or anyone acting for such firm, corporation, or institution has (1) violated the antitrust laws of the State of Texas under Texas Business & Commerce Code, Chapter 15, or the federal antitrust laws; or (2) communicated the contents of this Proposal either directly or indirectly to any competitor or any other person engaged in the same line of business during the procurement process for this RFP.

When a Texas business address shown hereon that address is, in fact, the legal business address of Respondent and Respondent qualifies as a Texas Resident Bidder under 1 TAC § 111.2.

Under Government Code § 2155.004, no person who prepared the specifications or this RFP has any financial interest in Respondent's Proposal. If Respondent is not eligible, then any contract resulting from this RFP shall be immediately terminated. Furthermore, "under Section 2155.004, Government Code, the vendor [Respondent] certifies that the individual or business entity named in this bid or contract is not ineligible to receive the specified contract and acknowledges that this contract may be terminated and payment withheld if this certification is inaccurate."

Under Family Code § 231.006, relating to child support obligations, Respondent and any other individual or business entity named in this solicitation are eligible to receive the specified payment and acknowledge that this contract may be terminated and payment withheld if this certification is inaccurate.

Any Proposal submitted under this RFP shall contain the names and social security numbers of person or entity holding at least a twenty-five percent (25%) ownership interest in the business entity submitting the Proposal.

Name:	Social Security Number:
Name:	Social Security Number:
Name:	Social Security Number:

Under Government Code §669.003, relating to contracting with an executive of a state agency, Respondent represents that no person who, in the past four years, served as an executive of the Texas Comptroller of Public Accounts (*Agency Name*) or any other state agency, was involved with or has any interest in this Proposal or any contract resulting from this RFP. If Respondent employs or has used the services of a former executive head of (*Agency Name*) or other state agency, then Respondent shall provide the following information: Name of former executive, name of state agency, date of separation from state agency, position with Respondent, and date of employment with Respondent.

(*Agency Name*) is federally mandated to adhere to the directions provided in the President's Executive Order (EO) 13224, Executive Order on Terrorist Financing – Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism, effective 9/24/2001 and any subsequent changes made to it via cross-referencing respondents/vendors with the Federal General Services Administration's Excluded Parties List System (EPLS, <http://www.epls.gov>), which is inclusive of the United States Treasury's Office of Foreign Assets Control (OFAC) Specially Designated National (SDN) list.

Respondent certifies that the responding entity and its principals are eligible to participate in this transaction and have not been subjected to suspension, debarment, or similar ineligibility determined by any federal, state or local governmental entity and that Respondent is in compliance with the State of Texas statutes and rules relating to procurement and that Respondent is not listed on the federal government's terrorism watch list as described in Executive Order 13224. Entities ineligible for federal procurement are listed at <http://www.epls.gov>.

Pursuant to Section 2262.003 of the Texas Government Code, the state auditor may conduct an audit or investigation of the vendor or any other entity or person receiving funds from the state directly under this contract or indirectly through a subcontract under this contract. The acceptance of funds by the Respondent or any other entity or person directly under this contract or indirectly through a subcontract under this contract acts as acceptance of the authority of the state auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. Under the direction of the legislative audit committee, the Respondent or other entity that is the subject of an audit or investigation by the state auditor must provide the state auditor with access to any information the state auditor considers relevant to the investigation or audit. Respondent will ensure that this clause concerning the authority to audit funds received indirectly by subcontractors through the vendor and the requirement to cooperate is included in any subcontract it awards.

Respondent certified that it has not been an employee of the *agency name* within the last twelve (12) months.^{bxxxxvi}

Respondent agrees that any payments due under this contract will be applied towards any debt, including but not limited to delinquent taxes and child support that is owed to the State of Texas.^{bxxxxvii}

Respondent represents and warrants that the individual signing this Execution of Proposal is authorized to sign this document on behalf of the respondent and to bind the respondent under any contract resulting from this proposal.

Under Section 2155.006(b) of the Texas Government Code, a state agency may not accept a bid or award a contract, including a contract for which purchasing authority is delegated to a state agency, that includes proposed financial participation by a person who, during the five-year period preceding the date of the bid or award, has been: (1) convicted of violating a federal law in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricane Rita, as defined by Section 39.459, Utilities Code, Hurricane Katrina, or any other disaster occurring after September 24, 2005; or (2) assessed a penalty in a federal civil or administrative enforcement action in connection with a contract awarded by the federal government for relief, recovery, or reconstruction efforts as a result of Hurricane Rita, as defined by Section 39.459, Utilities Code, Hurricane Katrina, or any other disaster occurring after September 24, 2005. Under Section 2155.006 of the Texas Government Code, the bidder certifies that the individual or business entity named in this bid is not ineligible to receive the specified contract and acknowledges that any contract resulting from this IFB may be terminated and payment withheld if this certification is inaccurate.

Criminal History Background Checks

The following provision allows an agency to require criminal history background checks of contractor employees and subcontractors who have access to information resources technology of state agencies. Note that under Section 411.1405, Government Code, agencies must have a written policy that has been approved by the Office of the Attorney General relating to the use of background checks before such checks can be performed. If an agency has authority to require other types of background checks and wishes to perform those checks on contractors' employees, a contract provision to authorize such would be needed.

Contractor's employees, applicants, interns and volunteers and the employees, applicants, interns and volunteers of Contractor's contractors identified by (*name of agency*) as having access to State of Texas information resources and information resources technologies, as defined in Texas Government Code,

Section 411.1405, are subject to periodic criminal history record investigations performed by the Department of Public Safety and the Federal Bureau of Investigation for *(name of agency)*. Individuals whose criminal histories are determined by *(name of agency)* to be unsatisfactory under the policy promulgated by *(name of agency)*, and approved by the Office of the Attorney General shall not be allowed access to State of Texas information resources and information resources technologies and may, at the discretion of *(name of agency)* be precluded from providing services through this Contract. Contractor shall reimburse *(name of agency)* the cost of the criminal history background investigations.

Appendix 10

Best Value – Respondent Questionnaire

Respondent Questionnaire

Respondents must complete all of the following blanks and include all required attachments in Respondent's Offer **AT THE TIME OF THE INITIAL SUBMISSION OF THE OFFER TO Agency.**

A. Respondent's Contact Person. Respondent must list the name, title, email address, phone number and fax number of the individual who will be the contact person for the term of any PO resulting from this RFO.

Name:_____

Title:_____

E-mail address:_____

Telephone:_____

Fax:_____

Email Address of Contact:_____

B. References. Respondent must provide a list of **four (4)** state agencies, corporations or other entities other than agency for which Respondent has provided the requested or similar items in the RFO during the past three (3) years. Respondent must include dates when requested or similar items in the RFO were provided, names, telephone numbers and email addresses of state agency's or firm's contact person. If none, specify none.

This information will be used in evaluating Respondent's references, Respondent's prior performance and other indicators of Respondent's probable performance under any PO resulting from this RFO.

(1) State Agency or Other Entity:_____

Date Item Provided:_____

Name of Contact:_____

Telephone Number of Contact:_____

Email Address of Contact:_____

(2) State Agency or Other Entity:_____

Date Item Provided:_____

Name of Contact:_____

Telephone Number of Contact:_____

Email Address of Contact:_____

(3) State Agency or Other Entity:_____

Date Item Provided:_____

Name of Contact:_____

Telephone Number of Contact:_____

Email Address of Contact:_____

(4) State Agency or Other Entity:_____

Date Item Provided:_____

Name of Contact:_____

Telephone Number of Contact:_____

Email Address of Contact:_____

C. Cancellations or Terminations. Respondents must list **all** contracts or purchase orders that Respondent executed or accepted within the last **three (3) years** and which were canceled or terminated prior to completion by any state agency or other entity with which Respondent contracted. For each such contract or purchase order, Respondent must include a detailed explanation for the cancellation or termination and final resolution of the matter. Include the names and telephone numbers of each such state agency's or firm's contact person. If none, specify none.

This information will be used in evaluating Respondent's references, Respondent's prior performance and best value criteria such as other indicators of Respondent's probable performance under any PO resulting from this RFO.

D. Profile. Respondent must include the following profile that:

- (a) describes the general nature of previous similar work performed by Respondent, particularly work in the last three (3) years;

(b) describes the size and scope of all operations, including number of Respondent's employees and years in business;

(c) describes Respondent's prior contracting experience with state agencies and similar entities; and

(d) any other information Respondent believes is pertinent to this RFO.

E. Personnel. Respondent must provide in detail the qualifications, education, training, experience and certifications of all Respondent's employees who will or may provide the items under any PO resulting from this RFO. Respondent must provide this information for each such employee. If additional pages are required, use this format on any additional pages.

Employee's Name:_____

Qualifications:_____

Education:_____

Training:_____

Experience:_____

Certifications:_____

Employee's Name:_____

Qualifications:_____

Education:_____

Training:_____

Experience:_____

Certifications:_____

Employee's Name:_____

Qualifications:_____

Education:_____

Training:_____

Experience:_____

Certifications:_____

F. Narrative. Respondents must submit a detailed narrative explanation of how the offered items will meet the requirements of (Section of RFO that details specific requirements). If agency requires a copy of this narrative, it must be submitted in Microsoft Word format.

Appendix 11

Sample Contract Monitoring Sheet

DRAFT – SAMPLE CONTRACT MONITORING WORKSHEET; To be Included in Contract Monitoring Binder; References to Tabs are to Location in Binder									
Contractor Type of Contract	Specific Monitoring Activities to Be Performed	Performance Method including information sources to be used	Responsible Individual for Each Monitoring Activity	Monitoring Activity Frequency	Monitoring Activity Documentation Method	Results of Monitoring Activity Communicated to	Results of Monitoring Used to (include follow up requirements)	Communicated to	Use
Acme Consultants, PC; Consulting Services								Board, Investment Committee,	Reallocate funds to
	Review of Consultant's Quarterly Draft Reports for Contract Compliance	Compare Draft Report to Contract requirements	Jane Doe	Quarterly	E-mail report	Betty Jo, IT Div Manager	Routine status reports by Betty Jo, IT Div Manager, to Exec Management; Acceptance or rejection of draft report deliverables as provided in Contract; Review milestone invoices prior to approval for payment; Require redelivery of draft report deliverables; Terminate Consultant for nonperformance; Solicit replacement services		

Appendix 12

BAFO Evaluation Example

Notes

Evaluation Results

Cost - Score Calculation Points awarded based on the least expensive awarded the maximum points and other offers prorated based on difference between their offer price and low offer. (See breakout of cost in attached schedules.)

Acme Project Evaluation Matrix - EXAMPLE

<u>RFO Evaluation Criteria [Section A, item 20 of RFO]</u>	<u>Weight</u>	<u>Max Points</u>	Company A	Company B
Costs	30	30	22.5	25
Qualifications & Methodology (Indicators of Probable Vendor Performance)	30			
Experience [Section C, Parts 1 through 6 of RFO and Appendix A of Offer]	50.0%	15	12	10.5
Proposed Work plan and Approach [Section B, items 8 through 20 of RFO and Appendix B of Offer]	25.0%	7.5	6	5.25
Personnel [Section C, items 7 through 10 of RFO and Appendix C of Offer]	25.0%	7.5	5.25	5.63
		30	23.25	21.38
Technical Functionality	40			
Minimum Functions [Section B, items 1 through 20 of RFO and Appendix D of Offer]	75.0%	30	21	24
Additional Functions [Section B, items 21 through 40 of RFO and Appendix D of Offer]	25.0%	10	7	8
		40	28	32
Total	100%	100	74	78

Costs				Vendor Response / Evaluation		
Functions				Company A	Company B	
Criteria	Costs	30	Max Score	Weight 30%		Lowest Cost
Minimum Functions [Section B, items 1 through 20 of RFO and Appendix D of Offer]				Cost	\$300,000	\$200,000
	75.0%	22.5	Score	15	22.5	
				Cost	\$50,000	\$150,000
Additional Functions [Section B, items 21 through 40 of RFO and Appendix D of Offer]				Score	7.5	2.5
				Score	22.5	25

				Vendor Response / Evaluation	
				Company A	Company B
	Max Points	30			
Experience	50.0%	15.0	Rating	8	7
			Score	12	10.5
Proposed Work plan	25.0%	7.5	Rating	8	7
			Score	6	5.25
Personnel	25.0%	7.5	Rating	7	7.5
			Score	5.25	5.63
			Total Points	23.25	21.38

Notes:

Rating From 1 to 10, 10 reflecting highest / best possible

Score Allocated points awarded based on rating (10 rating receives maximum score)

Technical Functionality

				Vendor Response / Evaluation	
				Company A	Company B
	Max Points	40			
Minimum Functions	75.0%	30.0	Rating	7	8
			Score	21	24
Additional Functions	25.0%	10.0	Rating	7	8
		0	Score	7	8
Total Points				28	32

Notes:

Rating From 1 to 10, 10 reflecting highest / best possible

Score Allocated points awarded based on rating (10 rating receives maximum score)

Evaluation Rating Notes (supporting comment for rating)

Vendor 1

Vendor 2

COMPANY A

Ability Rating Issues/Questions

Experience	8	Quality of references and past projects relative RFO, Any Agency / State Experience?
Proposed Work plan	8	Is work plan reasonable, include appropriate staffing and clearly defined Agency roles, etc...? Is solution proposed to be provided within the XX day requirement? Does it include the transition out plan?
Personnel	7	Are proposed staff qualified with demonstrated relevant experience? Does the vendor reflect the ability to maintain a skilled workforce?

Functionality Issues/Questions

Minimum Functions	7	Are minimum functions supported? How practical is the solution proposed? How does the solution compare (how it works) with others proposed?
Additional Functions	7	Are all functions supported? How practical is the solution proposed? How does the solution compare (how it works) with others proposed?
Reference Notes:		Any exceptions taken to indemnification, limit of liability, change of ownership, arbitration, termination, effects of termination, insurance and term? Added support and software license agreements that need to be reviewed? HUB subcontracting proposed? Bond Information supplied? CISV ?

COMPANY B

Ability Rating Issues/Questions

Experience	7	Quality of references and past projects relative RFO, Any Agency / State Experience?
Proposed Work plan	7	Is work plan reasonable, include appropriate staffing and clearly define CPA roles, etc...? Is solution proposed to be provided within the XX day requirement? Does it include the transition out plan?
Personnel	7.5	Are proposed staff qualified with demonstrated relevant experience? Does the vendor reflect the ability to maintain a skilled workforce?

Functionality Issues/Questions

Minimum Functions	8	Are minimum functions supported? How practical is the solution proposed? How does the solution compare (how it works) with others proposed?
Additional Functions	8	Are all functions supported? How practical is the solution proposed? How does the solution compare (how it works) with others proposed?

Reference Notes: Any exceptions taken to indemnification, limit of liability, change of ownership, arbitration, termination, effects of termination, insurance and term? Added support and software license agreements that need to be reviewed? HUB subcontracting proposed? Bond Information supplied? CISV ?

Appendix 13

RFP Bid Tabulation Sheet

Total Scores:							
	<u>Bidder A</u>	<u>Bidder B</u>	<u>Bidder C</u>	<u>Bidder D</u>	<u>Bidder E</u>	<u>Bidder F</u>	<u>Bidder G</u>
Price	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!
Points +							
Technical							
Average							

value - 60%

Prices:

	<u>Bidder A</u>	<u>Bidder B</u>	<u>Bidder C</u>	<u>Bidder D</u>	<u>Bidder E</u>	<u>Bidder F</u>	<u>Bidder G</u>
	(low)						
prices=							
points =	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!	#DIV/0!

evaluator

Technical Scores:

max score
per item

10 item 1
15 item 2
10 item 3
5 item 4
0 unassigned
0 unassigned

40 points = 0 0 0 0 0 0 0

evaluator

scored items:

max score
per item

10 item 1
15 item 2
10 item 3
5 item 4
0 unassigned
0 unassigned

40 points = 0 0 0 0 0 0 0

evaluator

scored items:

max score
per item

10 item 1
15 item 2
10 item 3
5 item 4
0 unassigned
0 unassigned

40 points = 0 0 0 0 0 0 0

Evaluator
Totals:

evaluator	0	0	0	0	0	0	0
evaluator	0	0	0	0	0	0	0
evaluator	0	0	0	0	0	0	0
Totals =	0	0	0	0	0	0	0
Technical Average Score	0	0	0	0	0	0	0

Appendix 14

Sample Executive Approval Memo

DATE:

TO: [Name of Executive]

THROUGH: [Name of Division Director]

FROM: [Name of Project Manager]

SUBJECT: Request for Executive Approval To Renew Contract with (name of Contractor)

Background and Specific Request paragraphs;

Include background about purpose and nature of contract, services performed to date, highlights, note any concerns, name of contractor, date contract expires unless renewed (such as 8/31/04), period of renewal requested (such as 9/1/04 through 8/31/05), amount of \$ for period through expiration date (8/31/04, for example) and amount of \$ for the renewal period (such as 9/1/04 through 8/31/05).

Make reference to the completed and approved purchase requisition if one is required.

State that the renewal period was provided for in the corresponding RFP and therefore renewal is an option without having to re-solicit competitive proposals for this renewal period.

State the next estimated date that executive approval will be requested to issue a new solicitation for the contracted services (when either it is preferred that the services be opened to competition or when the RFP renewal options run out).

State how the renewal is in compliance with the Contracts Management Guide.

Include mandatory paragraph about contract monitoring, such as:

[Name of using division] has monitored the contractor's performance against the contract and has attached the updated contract monitoring schedule for your review.

The [name of using division] believes that the contractor is in substantial compliance with all requirements of the contract and therefore recommends renewal.

[Name of Executive]

Approved: _____

Disapproved: _____

Let's Discuss: _____

Appendix #15

Contract Management Best Practices Matrix

CMG – Contract Management Guide

TAC – Texas Administrative Code

TGC – Texas Government Code

TPM – Texas Procurement Manual

COMPONENT	POOR	AVERAGE	BEST PRACTICE	REFERENCES
Processes	<ul style="list-style-type: none"> No standard processes for contracting or compliance management Results in labor intensive processes, duplication of effort, and poorly written solicitations and contracts No contract or solicitation document templates. Every contract or solicitation document looks different No formal, repeatable process for consistent solicitation development Contract Managers not involved from “cradle to grave” Contract Management Guide is ignored or not consulted No effort to capture “lessons learned” and “best practices” No structured business planning process to determine sourcing and re-bid strategy No contract processes that overlap with existing project management practices are defined 	<ul style="list-style-type: none"> Contract processes are defined at the division level, but are sporadically followed Sporadic compliance enforcement Contract templates utilized sporadically or limited availability of templates Limited formal, repeatable process for consistent solicitation development Contract managers assigned after award is made Contract Management Guide is used sporadically to address specific questions or concerns Undocumented “lessons learned” and “best practices” incorporated into processes Limited planning to determine solicitation efforts, re-bid strategies Contract processes that overlap with existing project management practices are defined, but are sporadically followed 	<ul style="list-style-type: none"> Contracting process standardized agency-wide Proactive compliance enforcement Formal templates utilized for all solicitations and contracts Formal, repeatable process (e.g., project management methodology) for consistent solicitation development Contract managers are involved in writing solicitation, negotiating contract, managing contract and contract closeout The Contract Management Guide serves as a roadmap to guide the contracting process Active collection of “lessons learned” and “best practices” are leveraged for continuous improvement Active, formal business planning process Standardized agency-wide contracting process is comprehensively integrated with existing standardized agency-wide project management practices 	<ol style="list-style-type: none"> CMG Ch.1,p.1,2, CMG Ch.7,p.4, Post Award Conf. Agenda, CMG Ch.2,p.9,10, Procurement Lead Time, TGC Section 2262.051 (h). Contract Management Guide; Rules, TGC Section 2262.051(f) Contract Management Guide; Rules, TAC Title 34, Part 1, Chapter 20: Texas Procurement and Support Services, Subchapter G: Contract Procedures, TAC Title 34, Part 1, Chapter 20: Texas Procurement and Support Services, Subchapter C: Procurement , TPM Sect.2.4, Selecting a Procurement Method, TGC Section 2262.052 (a) Compliance With Guide CMG Intro.,p.5, Contract Mgt. Framework, Ch.2,p.1, Planning, CMG Ch.8,p.1, Contract Close Out, CMG Ch.7,p.22,23, Contract Admin. File., CMG Ch.3,p.15, Final Acceptance, TGC Section 2262.001(3) Definitions CMG Ch.7, p.2,3, Planning, TGC Section 2262.051(c). Contract Management Guide; Rules, TGC Section 2262.053. Training, CMG Ch.8,p.1, Contract Close Out, CMG Ch.7,p.22,23, Contract Admin. File., CMG Ch.3,p.15, Final Acceptance CMG Introduction,p.1,2, TGC Section 2262.051(a) Contract Management Guide; Rules

Organization	<ul style="list-style-type: none"> No structured contract management group Contract decisions made and contracts managed by divisions/personnel “not in the know” No coordination between divisions involved in the procurement and contracting process Supporting team members (financial, legal, and purchasing, etc.) are not available to assist the contract manager No involvement of the end user/customer as subject matter expert during solicitation requirements gathering No executive support and involvement 	<ul style="list-style-type: none"> Contract managers assigned not always the person with the expertise or knowledge Contracting decisions coordinated at division level, but not consistently Sporadic coordination between contract manager, legal, procurement, etc. Supporting team members (financial, legal, and purchasing, etc.) for any given contract assigned “ad hoc” Limited involvement of the end user/customer as subject matter expert during solicitation requirements gathering Executive support but limited involvement 	<ul style="list-style-type: none"> Contract managers within each division possess technical and/or programmatic expertise and knowledge or have the expertise and knowledge readily available to them Contracting decisions involve all relevant parties Coordination and input from all relevant divisions to minimize risk and maximize compliance Contract management team members remain engaged through entire process – same staff assigned Active involvement of the end user/customer as subject matter expert during solicitation requirements gathering Executive support and active involvement 	<p>1. CMG Ch.2,p.2, Contract Mgt., TGC Section 2262.053 (A) Training, WOSG State Purchasing</p> <p>2. CMG Ch.2,p.2, Contract Mgt., CMG Ch.2,p.4, Communications Plan, CMG Ch.2,p.8, Research, CMG Ch.3,p.9, Agency’s Role, CMG Ch.3,p.11, Contractor Qualifications, Ch.4,p.6, Communication w/Respondents,</p> <p>3. CMG Ch.2,p.8, Research, Ch.2,p.2, Risk Mgt.,</p> <p>4. CMG Ch.2.,p.2, General Planning, Contract Mgt., CMG Ch.4,p.13, Evaluation & Award, Ch.2,p.7, Needs Assessment.</p>
Technology	<ul style="list-style-type: none"> No contract repository or very basic automated folders for contract storage Manual compliance reviews Developing high level reports with quality contract information is nonexistent or is very labor intensive 	<ul style="list-style-type: none"> Contracts repository supported at division level by basic storage system with little to no reporting capabilities Limited ability to track compliance High level reports have to be manually created from contract status reports or contract repository 	<ul style="list-style-type: none"> Contract automation system that is searchable and allows for the uploading, monitoring and automated reporting of contracts Independent and formal mechanisms in place to track compliance for contract managers Amendments can be approved, uploaded, and tracked online 	<p>1. http://www.window.state.tx.us/procurement/pub/ autopurch/cp/, TPM 2.31, Electronic State Business Daily (ESBD), TPM Sec.2.33, Centralized Master Bidders List (CMBL), WOSG, State Purchasing, Publications, Manuals and Reference Guides, On Line Purchasing System, Contract System, WOSG, State Purchasing, Publications, Reports,</p> <p>2. CMG Ch.7, p.15, Substantive Changes, WOSG State Purchasing</p>
Performance Metrics	<ul style="list-style-type: none"> No involvement from contract manager or custodial division when developing deliverables/statement of work Poorly written, unclear or immeasurable deliverables and unclear association performance metrics and remedies or incentives Compliance and performance measured sporadically or inconsistently 	<ul style="list-style-type: none"> Deliverables/statement of work developed by Legal or Procurement with minimal input from contract manager or custodial division Unclear distinction between specifications, requirements and deliverables and performance metrics and associated remedies or incentives Compliance and performance measured quarterly but more than monthly 	<ul style="list-style-type: none"> Managing division and/or contract manager solely responsible for developing deliverables with input from Legal, Procurement, etc. Clear distinction of well-developed deliverables and performance metrics and associated remedies or incentives Compliance and performance measured consistently at least monthly 	<p>1. CMG Ch.3,p.14, Reporting, p.15, Final Acceptance, Ch.3,p.4, Elements of a Deliverable, CMG Ch.3,p.9, Established Standards</p> <p>2. CMG Ch.8,p.1, Contract Close Out, CMG Ch.7,p.22,23, Contract Admin. File., CMG Ch.3,p.15, Final Acceptance</p> <p>3. CMG Ch.7,p.2, Contract Mgr. Responsibilities, CMG Ch.7,p.6-12, Monitoring Performance, CMG Ch.3,p.14, Monitoring,</p>

Vendor Relations	<ul style="list-style-type: none"> • Improper or excessive communication with vendors immediately preceding and during an active solicitation phase • Little to no communication between contract manager and vendor during an active contract • No clear lines of communication of contract issues or dispute resolution 	<ul style="list-style-type: none"> • Communication with vendors during the solicitation phase • Sporadic communication between contract manager and vendor • Contract issues improperly reported and/or resolution sporadically enforced 	<ul style="list-style-type: none"> • Properly routed communication with potential vendors (i.e., through the purchaser) during the active solicitation phase • Frequent communication between contract manager and vendor pertaining to all aspects of contract, including issues, technical assistance and overall progress of the contract • Dispute resolution or contract issue procedures clearly defined 	<p>1. CMG Ch.7,p.12, Reporting, TPM Sec.2.50, Vendor Performance, WOSG State Purchasing Vendor Performance,</p> <p>2. CMG Ch.7,p.17, Dispute Resolution, TGC Chapter 2260 Resolution Of Certain Contract Claims Against The State, , TAC Title 34, Part 1, Chapter 20: Texas Procurement and Support Services, Subchapter G: Contract Procedures</p>
Fiscal	<ul style="list-style-type: none"> • Contract manager has little or no fiscal oversight capabilities • No contract manager record of payments made • No communication between Accounts Payable and Contract manager 	<ul style="list-style-type: none"> • Contract manager approves payments • Contract manager keeps copies of approved invoices in desk file • Only communicates with Accounts Payable when there's a problem 	<ul style="list-style-type: none"> • Contract manager approves all invoices, budget changes or fiscal amendments • Contract manager keeps a running payment log of all payments and what deliverables are covered by each payment • Contract manager routinely interacts with Accounts Payable regarding all fiscal contract matters, disputes, non-payment, etc. 	<p>1. CMG Intro.p.1, Purpose, CMG Ch.7,p.2, Contract Mgr. Resp., CMG Ch.7,p.8, Expenditure Document Review, CMG Ch.7,p.15,16, Substantive Changes, CMG Ch.7,p.13, Payment Approval, TAC Title 34, Part 1, Chapter 20: Texas Procurement and Support Services, Subchapter D: Payments</p> <p>2. CMG Ch.3,p.14, Reporting, p.15, Final Acceptance, TPM Sec. 2.57, USAS Requirements,</p> <p>3. CMG Ch.7,p.13, Payment Approval, TPM 2.54, Late Pmts., TAC Title 34, Part 1, Chapter 20: Texas Procurement and Support Services, Subchapter D: Payments</p>
Legal	<ul style="list-style-type: none"> • Statutorily mandated terms and conditions are not present 	<ul style="list-style-type: none"> • Some statutorily mandated terms and conditions are not present or regularly updated 	<ul style="list-style-type: none"> • All statutorily mandated terms and conditions are present and regularly reviewed and updated by relevant staff 	<p>1. CMG Ch.1,p.1, CAT Review of Major Contracts, CMG Ch.3,p.15, Additional Issues to Consider, CMG Ch.6,p.6, Legal Elements of a Contract, CMG Ch.6,p.12,13, Contract Terms, TGC Section 2262.051(f). Contract Management Guide; Rules</p>
Training	<ul style="list-style-type: none"> • Contract manager and/or purchasing staff do not have statutorily mandated training 	<ul style="list-style-type: none"> • Purchasing staff has statutorily mandated certification (i.e., CTP, CTPM), but contract managers are not certified CTCMs 	<ul style="list-style-type: none"> • Contract managers hold CTCM certification and purchasing staff holds CTP or CTPM certification 	<p>1.TPM Sec.1.1,Training & Certification, p.4, WOSG web site http://www.window.state.tx.us/procurement/prog/training-cert/cmt/training/requirements/, TGC Section 2155.078. Training And Certification Of State Agency Purchasing Personnel And Vendors, TGC Section 2262.053. Training, TPM Sec.1.1, Contract Mgr. Training</p> <p>2.TPM Sec.1.1,Training & Certification, p.3, WOSG web site http://www.window.state.tx.us/procurement/prog/training-cert/purchtrn_cert/training/training-and-certification-requirements-for-procurement-personnel/, TGC, Section 2155.078. Training And Certification Of State Agency Purchasing Personnel And Vendors, TPM Sec.1.1, Certified Texas Procurement Manager (CTPM)</p>

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Legal Reference Section

ⁱ Black's Law Dictionary (7th ed. 1999).

ⁱⁱ State agency means a department, board, commission or other entity of state government, other than a university system or an institution of higher education as defined by Section 61.003, Education Code, that:

- 1) has authority that is not limited to a geographical portion of the state;
- 2) was created by the constitution or a state statute with an ongoing mission and responsibilities;
- 3) is not the office of the governor or lieutenant governor;
- 4) is not within the judicial or legislative branch of government; and
- 5) is not a committee created under state law whose primary function is to advise an agency.

ⁱⁱⁱ Texas Government Code §572.001(a)

^{iv} Texas Government Code §572.051

^v Texas Government Code §2113.014(a)

^{vi} Texas Constitution, Article XVI, Section 21

^{vii} Texas Government Code §2052.302

^{viii} All notices requiring publication in the Texas Register, the Electronic State Business Daily, or newspapers should be identified, scheduled and drafted at this stage.

^{ix} Black's Law Dictionary (7th ed. 1999), defines: standard, n.2. A criterion for measuring acceptability, quality or accuracy. A legal standard that is based on conduct and perceptions external to a particular person. In tort law, for example, the reasonable person standard is considered an objective standard because it does not require a determination of what the defendant was thinking. *Subjective standard.* A legal standard that is peculiar to a particular person and based on the person's individual views and experiences. In criminal law, for example, premeditation is determined by a subjective standard because it depends on the defendant's mental state.

^x See Southwestern Bell Tel Co. V. FDP Corp. 811 S.W. 2d 572,576 (Tex. 1991) ("The UCC recognizes that breach of contract and breach of warranty are not the same cause of action. The remedies for breach of contract are set forth in section 2.711, and are available to a buyer "[w]here the seller fails to make delivery." Tex. Bus. & Com. Code §2.711(a). The remedies for breach of warranty, however, are set forth in section 2.714, and are available to a buyer who has finally accepted goods, but discovers that the goods are defective in some manner. Tex. Bus. & Com. Code §2.714, §2.711 (Comment 1); see also 1 J. White & R. Summers, Uniform Commercial Code 501 (3rd ed. 1988). Indeed, "the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell." Tex. Bus. & Com. Code § 2.313(Comment 4). No sound reason exists to apply a different standard when the contract is for services instead of goods.")

^{xi} Generally, a warranty describes then "character, quality or title" of that which is being sold and "by which seller promises or undertakes to insure that certain facts are or shall be as he then represents them." Black's Law Dictionary 1586 (6th ed. 1990). An express warranty is a definitive affirmation of fact or promise which becomes part of the basis for the bargain and upon which the parties rely. See Morris v. Adolph Coors Co., 735 S. W. 578, 587 (Tex.App.-Fort Worth 1987, writ ref'd n.r.e.). Implied warranties are based in tort law and are judicially interjected into agreements whenever necessitated by public policy to ensure that parties receive that for which they bargained. See Melody Home Mfg. Co. v. Barnes, 741 S. W. 2d 349, 353(Tex. 1987); see also Parkway Co. v. Woodruff, 901 S. W. 2d 434, 438 (Tex. 1995). A contract term identifies what is being sold; warranties described the attributes, suitability for a particular purpose and ownership of what is sold. Cf. Donnelley Mktg. v. Lionel Sosa, Inc. 716 S. W. 2d 598, 604 (Tex.App. – Corpus Christi 1986, no writ) (court held supplier's provision of wrong mailing list to advertiser was tantamount to no delivery at all and amounted to breach of contract). See Chilton Insurance Company v. Pate & Pate Enterprises, Inc. 930 S.W.2d 877 (Tex.App.-San Antonio 1996, rehearing overruled).

^{xii} Warranty of Title and Against Infringement; Buyer's Obligation against Infringement. Tex. Bus & Com. Code §2.312

^{xiii} Implied Warranty: Merchantability; Usage of Trade. Tex. Bus. & Com. Code §2,314 (merchantability – Goods to be merchantable must be at least such as: 1) pass without objection in the trade under the contract description; and 2) in the case of fungible goods, are of fair average quality within the description, and 3) are fit for the ordinary purposes for which

such goods are used; and 4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and 5) are adequately contained, packaged, and labeled as the agreement may required; and 6) confirm to the promises or affirmations of fact made on the container or label if any.); Tex. Bus. & Com. Code §2A.212. Implied Warranty of Merchantability (lease of personal property).

xiv Implied Warranty: Fitness for Particular Purpose. Tex. Bus. & Com. Code §2.315 (implied warranty that the goods shall be fit for such purpose, where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods); Tex. Bus. & Com. Code §2A.213 Implied Warranty of Fitness for Particular Purpose (lease of personal property).

xv Texas Government Code, §2155.074, §2155.075, §2156.007, §2157.003 and § 2157.125, and Texas Administrative Code, Title 1, Chapter 113.6

xvi See Tex. Bus. Com. Code §2.607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach after Acceptance; Notice of Claim or Litigation to Person Answerable Over (1967).

xvii See also Texas Government Code §2254.022(b), which states subchapter B does not discourage state agencies from using consultants if the agencies reasonably foresee the use of consultants will produce a more efficient and less costly operation or project.

xviii Texas Government Code §2254.026; See also General Appropriates Act, 77th Leg., S. B. 1, art. IX, §6.48(2001) (before expending appropriated funds for contracting for a consultant or other private assistance in conducting a legislatively mandated study that includes statistical or demographic data analysis, the state agency must determine if the resources of the Texas Legislative Council are available to perform this work).

xix Texas Government Code §2254.025. Note: A waiver will not be granted if the agency was negligent in foreseeing the occurrence of the emergency. See §2254.025(e).

xx Texas Government Code §2254.024©; See also 34 TAC §5.54 (The Office of the Comptroller of Public Accounts has rules regarding consultants, but the dollar thresholds reflect lower amounts as prescribed in previous versions of the statute).

xxi Texas Government Code §2254.002(2). See also Atty Gen. Op. JC-0374 (2001). The issue addressed by this opinion was: "whether a registered professional surveyor may provide a competitive bid to the primary contractor of a contract with a government entity."

... the Professional Services Act applies whenever a governmental entity awards a contract that includes professional services as a component part; we turn to the question of whether a surveyor may submit competitive bids to a prime contractor in connection with a governmental contract. The Professional Services Procurement Act does not impose any legal obligation on a professional to refrain from providing a competitive bid to a governmental entity. The prohibition against competitive bidding in section §2254.003 applies to a governmental entity rather than a professional. See Texas Government Code Ann. §2254.003 (Vernon 2000) ("*a governmental entity may not* select a provider of professional services or a group or association of providers or award a contract for the services on the basis of competitive bids submitted for the contract or for the services...") (emphasis added). Similarly, the requirements for procuring architectural, engineering, and land survey services apply to the governmental entity rather than the architect, engineer or surveyor or prime contractor. See id §2254.004(a) ("In procuring architectural, engineering, and land survey services, a *governmental entity* shall ...") (emphasis added).

xxii Texas Government Code §2254.003(e).

xxiii Texas Government Code §2254.004

xxiv C. & H Transportation Company v. Wright, 396 S. W. 2d 443, 446 (Civ App.-Tyler 1965, ref. n.r.e.).

xxv Foster v. Wagner, 343 S. W. 2d 914, 927 (Civ.App.-El Paso 1961, ref. n.r.e.).

xxvi See the following excerpt from AG Opinion JC-0131 (1999).

"There are numerous limitations on the contracting authority of state officers and employees pertinent to your inquiry. First and foremost, no one has the authority to make a contract binding on the state unless authorized to do so by the constitution or by statute. See State v. Ragland Clinic-Hosp. 159 S.W.2d 105, 106 (Tex. 1942); Vitapro Foods, Inc. v State, 969 S.W.2d 84, 88 (Tex.App.-Texarkana 1998, pet granted). Normally authority to bind the state is given by the legislature to entities such as the governing boards of state agencies and to state officers, rather than to employees. In some instances, contracting authority granted to a governing board may be delegated to other officers or employees. For example, the Education Code allows the University of Houston board of trustees to delegate its contracting authority: "All contracts of the university shall be approved by a majority of the board. However, the board is authorized to adopt reasonable rules that delegate to the president or his authorized representatives the authority to negotiate, approve and execute contracts." Tex. Educ. Code Ann. §111.34 (Vernon 1991). Similarly, under the Government Code, "[t]he Texas Transportation Commission may delegate to one or more employees of the Texas Department of Transportation the authority to approve vouchers for expenditures from the state fund and the authority to approve and sign contracts and other documents." Tex. Gov't Code Ann. §2103.064 (Vernon Supp. 1999). All state officers and employees are potentially able to bind the state, but to do so they must be able to point to some constitutional or statutory authority for their actions."

“Apparent authority is not enough to make an obligation binding upon the state; an officer or employee must have actual authority to do so. VitaPro, 969 S.W.2d at 88. In a contract between private parties, an agency who has no actual authority to bind his principal can nevertheless bind the principal if the principal leads the other party to believe that the agency had the authority to act on the principal’s behalf. See Moodey v. E.M.C. Servs., Inc., 828 S.W.2d 237, 241 (Tex.App. - Houston [14th Dist.] 1992, writ denied). In such a case, the principal is estopped from claiming that the agent had no authority to act on the principal’s behalf. Id. But the powers of state officers are set by law and all persons dealing with them are charged with notice of the limits of their authority and are bound at their peril to ascertain whether a contemplated contract is within the power conferred. Ragland Clinic-Hosp., 159 S.W. 2d at 107; VitaPro, 969 S.W.2d at 88. Thus, even if a state officer or employee appears to have authority to bind the state, the state will not be bound unless the officer or employee had actual authority to bind the state.”

“Second, the subjects of state contracts, the procedure for entering into contracts, and the general policy relating to contracts are all within the power of the legislature to establish. See Texas Nat’l Guard Armory Bd., 126 S.W.2d at 637. Although an oral contract is normally just as binding and enforceable as a written contract, See Ward v. Strickland, 177 S.W.2d 79, 82 (Tex.Civ.App.-Dallas 1943, writ ref’d), the authority of a person or entity to enter into an oral contract on behalf of the state may be restricted by the constitution or by statute or regulation.”

xxvii State v. Ragland Clinic-Hosp., 138 Tex. 393, 159 S.W. 2d 105 (1942); State ex rel. Dept. of Criminal Justice v. VitaPro Foods, Inc. 8 S.W.3d 316, 322 (Tex. 1999). Rehearing overruled.

xxviii Tex. Gov’t. Code §2155.061 Commission Purchasing System.

- (a) The commission shall acquire by purchase, lease rental or another manner all goods and services for a state agency, including a purchase that does not require a competitive bid or a spot purchase.
- (b) The commission shall operate an effective and economical system for purchasing goods and services.

xxix Tex. Gov’t Code §2162.105. Exemption from Purchasing Laws.

xxx Tex. Gov’t Code § 2155.134

xxxi Tex. Gov’t Code § 2155.135

xxxii Tex. Gov’t Code § 2155.136

xxxiii Tex. Gov’t Code § 2155.138

xxxiv Tex. Gov’t Code § 2155.139

xxxv Tex. Gov’t Code § 2155.140

xxxvi Tex. Gov’t Code § 2155.141

xxxvii Tex. Gov’t Code § 2155.142

xxxviii Tex. Gov’t Code § 2155.143

xxxix Tex. Gov’t Code § 2155.144

xl Tex. Gov’t Code § 2155.1441

xli Tex. Gov’t Code § 2155.146

xlii Tex. Gov’t Code § 2155.202

xliii Tex. Gov’t Code § 2155.203

xliv Tex. Gov’t Code § 2155.204

xlv State ex rel. Dept. of Criminal Justice v. VitaPro Foods, Inc., 8 S.W.3d 316, 322 (Tex. 1999) rehearing overruled.

xlvi Tex. Gov’t Code § 2155.132(f); 1 T.A.C. §113.11 (3). For items that are required by statute to be purchased from a particular source, See Government Code §497.024 et seq. (if the Texas Department of Criminal Justice produces an article or product under the Prison Made Goods Act, state agencies may purchase the article or product only from the Department). For definitions of ‘scheduled purchase’ and ‘term contract purchase’, See 1 T.A.C. §113.2 (55) (a ‘scheduled purchase’ is a purchase with a pre-scheduled bid opening date, allowing the Commission to combine orders for goods); (62) (a ‘term contract purchase’ is a purchase under a term contract, which established a source of supply for particular goods at a given price for a specified period).

xlvii See Buxani v. Nussbaum, 940 S. W. 2d 350, 352 (Tex App.-San Antonio 1997, no writ); and Hallmark v Hand, 885 S.W.2d 471, 476 (Tex.App.-El Paso 1994, writ denied); see also McCulley Fine Arts Gallery, Inc. v “X” Partners, 860 S.W.2d 473, 477 (Tex. App. - El Paso, 1993, no writ).

xlviii See Roark v. Stallworth Oil and Gas Inc., 813 S.W.2d 492,496 (Tex. 1991); and see also Federal Sign v. Texas Southern University, 951 S.W.2d 401,408 (Tex. 1997) rehearing of cause overruled (Oct 02, 1997).

^{xlix} Restatement (Second) of Contracts §24 (1981).

¹ Restatement (Second) of Contracts §50 (1) (1981).

^{li} United Concrete Pipe Corp. v Spin-Line Co., 430 S.W.2d 360, 364 (Tex. 1968).

^{lii} Antonini v. Harris County Appraisal Dist. 999 S.W.2d 608, 611 (Tex.App.-Houston [14th Dist] 1999, no pet.)

^{liii} Weynand v Weynand, 990 S.W.2d 843, 846 (Tex. App.-Dallas 1999, pet. denied).

^{liv} Copeland v Alsobrook, 3 S.W.2d 598, 604 (Tex. App. - San Antonio 1999, pet. denied).

^{lv} Wiley V. Bertelson, 770 S.W.2d 878,882 (Tex. App.-Texarkana 1989, no writ).

^{lvi} Gulf Coast Farmers Co-op v. Valley Co-op Oil Mill, 572 S.W.2d 726, 737(Tex. Civ. App. - Corpus Christi 1978, no writ).

^{lvii} Runnells v. Firestone, 746 S.W.2d 845, 849 (Tex. App. - Houston [14th Dist.] 1988), writ denied per curiam, 870 S.W.2d 240 (Tex. 1988).

^{lviii} Copeland, 3 S.W.3d at 605

^{lix} T.O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 221 (Tex. 1992).

^{lx} Komet v. Graves, 40 S.W.3d 596, 602 (Tex. App.-San Antonio 2001, no pet.); Hardin Constr. Group, Inc. v Strictly Painting, Inc. 945 S.W. 2d 308, 313 (Tex App. - San Antonio 1997, orig. proceeding); Texas Oil Co. v. Tenneco Inc., 917 S.W.2d 826, 830 (Tex. App.-Houston [14th Dist.] 1994), rev'd on other grounds sub nom. Morgan Stanley & Co., Inc. v. Texas Oil Co., 958 S.W.2d 178 (Tex. 1997).

^{lxi} T.O. Stanley Boot Co., 847 S.W.2d at 221; Scott v. Ingle Bros. Pac., Inc. 489 S.W. 2d 554, 555 (Tex. 1972); Texas Oil Co., 917 S.W.2d at 830; Komet, 40 S.W.3d at 602.

^{lxii} Texas Oil Co., 917 S.W.2d at 830.

^{lxiii} T.O. Stanley Boot Co. v Bank of El Paso, 847 S.W.2d 218, 221 (Tex. 1992).

^{lxiv} Fort Worth Indep. Sch. Dist. V. City of Fort Worth, 22 S.W.3d 832, 846 (Texas. 2000) (quoting Texas Oil Co. v. Tenneco Inc., 917 S.W. 2d 826, 830 (Tex. App.-Houston [14th Dist] 1994), rev'd on other grounds, 958 S.W.2d 178 (Tex. 1997)).

^{lxv} T.O. Stanley Boot Co., 847 S.W.2d at 221.

^{lxvi} Scott v. Ingle Bros. Pacific., Inc., 489 S.W.2d 554, 555 (Tex. 1972); City of Fort Worth v. Gene Hill Equip. Co., 761 S.W.2d 816, 820 (Texas.App.-Dallas, 1991).

^{lxvii} Texas Oil Co., 917 S.W.2d at 830.

^{lxviii} When a contract leaves open the time and place of performance, the law may imply that the time of performance was to be reasonable time. Moore v. Dilworth, 142 Tex. 538, 542 179 S.W.2d 940, 942 (1944). What is reasonable depends on the facts and circumstances as they existed at the date of the contract. Heritage Resources, Inc. v. Anschutz Corp., 689 S.W.2d 952, 955 (Tex.App.-El Paso 1985, writ ref'd n.r.e.). See also Solomon v. Greenblatt, 812 S.W.2d 7 (Tex.Appl.-Dallas, 1991) (court implied the time and place of performance in a 'consulting services' contract for management consulting.).

^{lxix} Smith v. Renz, 840 S.W. 2d 701, 704 (Tex.App.-Corpus Christi 1992, writ denied).

^{lxx} Roark, 813 S.W.2d at 496.

^{lxxi} Solomon V. Greenblatt, 812 S.W.2d 7, 15(Tex.App.-Dallas 1991, no writ).

^{lxxii} City of Crystal City v. Crystal City County Club, 486 S.W.2d 887,888 (Tex.Civ.App.-Beaumont 1972, writ ref'd n.r.e.); see also Jennings v. Radio Station KSCS, 96.3 FM, Inc., 708 S.W.2d 60, 61 9Tex.App.-Forth Worth 1986) rev'd on other grounds, 750 S.W.2d 760 (Texas 1988) (plaintiff/listener entitled to collect contest proceeds; consideration to radio station was gain in new listeners who hoped to win contest).

^{lxxiii} Texas Business & Commerce Code §2.2.07 Sales, may be applicable in certain types of transaction.

§2.207. Additional Terms in Acceptance or Confirmation

- (a) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
- (b) The additional terms are to be construed as proposal for addition to the contract. Between merchants such terms become part of the contract unless:
 - a. The offer expressly limits acceptance to the terms of the offer;
 - b. They materially alter it; or

-
- c. Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

- (c) Conduct by both parties which recognized the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of this title.

lxxiv Texas Government Code §2251.

lxxv Attorney General Opinion No. MW-296 (MW-296)

lxxvi Attorney General Opinion No V-981 (V-981)

lxxvii Attorney General Opinion No. MW-296 (MW-296)

lxxviii Niles v. Harris County Fresh Water Supply District No. 1A, 336 S.W.2d 637 (Tex. Civ. App.--Waco 1960, writ ref'd)

lxxix Texas Administrative Code §113.9(d) 1.

lxxx **Elements for Breach of Contract.** The essential in a suit for breach of contract are: (1) the existence of a valid contract; (2) that the plaintiff performed or tendered performance; (3) that the defendant breached the contract; and (4) that the plaintiff was damaged as a result of the breach. Landrum v. Devenport, 616 S.W.2d 359, 361 (Tex. Civ. App. – Texarkana 1981, no writ); Bradley v. Houston State Bank, 588 S.W.2d 618, 624 (Tex. App. – Houston[14th Dist.] 1979, writ ref'd n.r.e.); Hussong v. Schwan's Sales Enterprises, Inc., 896 S.W.2d 320, (Tex. App. – Houston[1st Dist.] 1995, no writ); Wright v. Christian & Smith, 950 S.W.2d 411, 412 (Tex. App. – Houston [1st Dist] 1997, no writ); McCulley Fine Arts Gallery, Inc. v. "X" Partners, 860 S.W.2d 473, 477 (Tex. App.-El Paso 1993, no writ).

Elements for Breach of an Express Warranty. In order to recover for the breach of an express warranty, a plaintiff must prove: (1) an express affirmation of fact or promise by the seller relating to the goods;(2) that such affirmation of fact or promise became a part of the basis of the bargain; (3) that the plaintiff relied upon said affirmation of fact or promise; (4)that the goods failed to comply with the affirmations of fact or promise; (5) that the plaintiff was injured by such failure of the product to comply with the express warranty; and (6) that such failure was the proximate cause of plaintiff's injury. General Supply and Equipment Co., Inc. v Phillips, 490 S.W.2d 913, 917 (Tex. Civ. App. – Tyler 1972, writ ref'd n.r.e.); Tex Bus. & Com. Code Ann. Sec. 2.313 (Vernon 1968).

Privity of Contract. It is a fundamental rule of law that only the person whose primary legal right has been breached may seek redress from an injury. Nobles v. Marcus, 533 S.W.2d 923, 927 (Tex. 1976); Sherry Lane National Bank v. Bank of Evergreen, 715 S.W.2d 148, 152 (Tex. App. – Dallas 1986, writ ref'd n.r.e.). Stated another way, one may not maintain an action based upon the harm suffered by another. Texas Industrial Traffic League v. Railroad Commission of Texas, 628 S.W.2d 187, 191 (Tex. App. – Austin 1982), rev'd on other grounds, 633 S.W.2d 821 (Tex. 1982).

In contract actions, privity of contract is an essential element of recovery. Republic National Bank v. National Bankers Life Ins. Co., 427 S.W.2d 76, 79 (Tex. Civ. App. – Dallas 1977, no writ). In order to maintain an action to recover damages flowing from the breach of a written agreement, there must be ordinarily be a privity existing between the party damaged and the party south to be held liable for the repudiation of the agreement. *Id.* “A well defined exception to the general rule thus stated is that one who is not privy to the written agreement may demonstrate satisfactorily that the contract was actually made for his benefit and that the contracting parties intended that he benefit by it so that he becomes a third-party beneficiary and eligible to bring an action on such agreement.” *Id.* By its very definition, however, such a third party beneficiary exception arises when on party asserts that it is the third-party beneficiary of a written agreement and, therefore, does not have to be in privity of contract with another party to bring an action against that party for breach of contract. *See* Exchange Bank & Trust v. Lone Star Life Ins. Co., 546 S.W.2d 948, 953 (Tex. Civ. App. – Dallas 1977, no writ); Briercroft Sav. & Loan Ass'n. v. Foster Fin. Corp., 833 S.W.2d 898, 902 (Tex. Civ. App. – Eastland 1976, writ ref'd n.r.e.).

Substantial Performance. Generally, a party to a contract who is itself in default cannot maintain a suite for its breach. *See* Dobbins v. Redden, 785 S.W.2d 377, 378 (Tex. 1990). The doctrine of substantial performance has ameliorated this rule by allowing a contract action by a builder who has breached, but nevertheless substantially completed, a building contract. *Id.* The doctrine is an equitable action that allows a contractor who has substantially performed a construction contract to sue on the contract rather than being relegated to his cause of action for quantum meruit. *See* Vance v. My Apartment Steak House of San Antonio, Inc., 677 S.W.2d 480, 482 (Tex. 1984). The doctrine does not permit the contractor to recover the full consideration provided in the contract because, by definition, the doctrine recognized that the contractor is in breach of the contract. *Id.* Although the contractor is allowed to sue on the contract, his recovery is decreased by the cost of remedying those defects for which he is responsible. *Id.*

A contractor seeking recovery on a substantial performance theory has the burden to please substantial performance, to provide that he did substantially perform, and to prove the consideration due him under the contract, and the cost of remedying the defects due to his errors or omissions. *Id.* at 483. Carr v. Norstok Bldg. Systems, Inc., 767 S.W.2d 936, 940 (Tex. App. – Beaumont 1989, no writ). A finding that a contract has been substantially completed is the legal equivalent of full compliance, less any offsets for remediable defects. Uhlir v. Golden Triangle Development Corp., 763 S.W. 2d 512, 515, (Tex. App. – Fort Worth 1988, writ denied).

To establish substantial performance of a contract, the defendant must show that the essential elements of the parties' contract were performed and that the defects in performance did not prevent the parties from accomplishing the purpose of the contract. Matador

Drilling Co. v. Post, 662 F.2d 1190, 1195 (5th Cir. 1981). Acceptance of performance alone does not constitute substantial performance, although it is a factor to be considered in determining whether there was substantial performance. Measday v. Kwik Kopy Corp., 713 F.2d 118, 124-25 (5th Cir. 1983).

Condition Precedent. A contract may include conditions precedent that must be satisfied before a vendor has an obligation of performance. A condition precedent may be either a condition to the formation of the contract or to an obligation to perform an existing agreement. Hohenberg Bros. Co. v. George E. Gibbons & Co., 537 S.W.2d 1, 3 (Tex. 1976). To make performance conditional, terms such as “if”, “provided that”, “on condition that”, or some similar phrase of conditional language must normally be included, although there is no requirement to utilize such language. Criswell v. European Crossroads Shopping Ctr., Ltd., 792 S.W.2d 945, 945 (Tex. 1990).

Promissory Estoppel. The doctrine of promissory estoppel is derived from § 90 of the Restatement of Contracts, which states: A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does not induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. Restatement (Second) of Contracts § 90 (1971); Aubrey v. Workman, 384 S.W.2d 389, 393 (Tex. Civ. App. – Fort Worth 1964), writ ref’d n.r.e.). Promissory estoppel does not operate to create liability where it does not otherwise exist. Hruska v. First State Bank of Danville, 747 S.W. 2d 783, 785 (Tex. 1988). Promissory estoppel does not create a contract where none existed before, but only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce them. “Moore” Burger, Inc. v. Phillips Petroleum Co., 492 S.W.2d 934, 937 (Tex. 1972).

The requisites of promissory estoppel in Texas are: (1) a promise; (2) foreseeability of reliance thereon by the promisee; and (3) substantial reliance by the promisee to his detriment. English v. Fischer, 660 S.W.2d 521, 524, (Tex. 1983). When promissory estoppel is raised to bar the application of the statute of frauds, there is an additional requirement that the promisor promised to sign a written document complying with the statute of frauds. Nagle v. Nagle, 633 S.W.2d 796, 800 (Tex. 1982); “Moore” Burger, 492 S.W.2d at 936-37 (Tex. 1972); Margin v. Norwest Mortgage, Inc., 919 S.W.2d 164, 167 (Tex. App. – Austin 1996, no writ); Coastal Corp. v. Atlantic Richfield Co., 852 S.W.2d 714, 718 (Tex. App. – Corpus Christi 1993, no writ); Cobb v. West Tex. Microwave Co., 700 S.W. 2d 615, 616 (Tex. App. – Austin 1985, writ ref’d n.r.e.).

Revocation of Acceptance (UCC). Under the UCC, a buyer may reject or revoke acceptance of non-conforming goods. Tex. Bus. & Com. Code Ann. §2.608 (Vernon 1994). Otherwise known as the “perfect tender” rule, a buyer may reject non-conforming goods in whole or in part. Tex. Bus. & Com. Code Ann. §2.608 (Vernon 1994). Rejection or revocation of acceptance will impose additional duties on a buyer.

Anticipatory Breach. The term anticipatory breach is a term that is described as a basis to avoid performance. To prove that affirmative defense of anticipatory breach of a contract, the defendant must show either words or actions by the plaintiff that indicate an intention to not perform the contract according to its terms. Builders Sand, Inc. v. Torture, 678 S.W.2d 115, 120 (Tex. App. – Houston [14th Dist.] 1984, no writ). The plaintiff must have distinctly, unequivocally, and absolutely refused to perform either the whole contract or a covenant which affects the whole consideration. American Bankers Inc. Co. v. Moore, 73 S.W.2d 620, 622 (Tex. Civ. App. – Fort Worth 1934, no writ). The refusal to perform must be unexcused. Taylor Pub. Co. V. Systems Mktg. Inc., 686 S.W.2d 213, 217 (Tex. App. – Dallas 1984, writ ref’d n.r.e.).

^{lxxxix} Texas Administrative Code §113.9

^{lxxxii} §2261.102. Liability Insurance Coverage Required. Each state agency shall, when feasible, include provisions in each of its contracts for goods or services that are subject to this chapter that require the contractor to carry director or officer liability insurance coverage in an amount not less than the value of the contract that is sufficient to protect the interests of the state in the event an actionable act or omission by a director or officer of the contractor damages the state’s interests.

^{lxxxiii} Texas Government Code §2261.101 Remedies and Sanctions Schedules. (a) Each state agency shall create and incorporate in each of its contracts for goods or services that are subject to this chapter a remedies schedule, a graduated sanctions schedule, or both, for breach of the contract or substandard performance under the contract. (b) State agencies shall design fair and feasible standards that will hold contractors accountable for breach of contract or substandard performance under a contract without diminishing the number of able providers who are willing to contract with the state.

^{lxxxiv} Texas Government Code §2155.4441. Preference Under Service Contracts.

^{lxxxv} Texas Government Code §572.051. Standards of Conduct; Texas Government Code §2155.003. Conflict of Interest

^{lxxxvi} Texas Government Code §2252.901. Contracts with Former or Retired Agency Employees; Texas General Appropriations Act, Article IX, Section 9-6.27.

^{lxxxvii} Tex. Bus. Corp. Act §2.45